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## **LEGISLATIVE PROBLEMS**

## **The Science of Legislation**

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Four volumes treating historically, descriptively, and critically the legislative branch of government in every aspect.

BY ROBERT LUCE

*A Member of the General Court of Massachusetts for nine years; of its Governor's Council, as Lieutenant-Governor, of the Constitutional Convention of 1917-19, and of the Congress of the United States, 1919-34*

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THE SCIENCE OF LEGISLATION

# LEGISLATIVE PROBLEMS

DEVELOPMENT, STATUS, AND TREND OF THE  
TREATMENT AND EXERCISE OF  
LAWMAKING POWERS

BY

ROBERT LUCE, A.M., LL.D.

*A Member of the General Court of Massachusetts for nine years; of the  
Governor's Council, as Lieutenant-Governor; of a Constitutional  
Convention, and of the Congress of the United States  
for sixteen years*



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## **LEGISLATIVE PROBLEMS**





# LEGISLATIVE PROBLEMS

## CHAPTER I

### THE SEPARATION OF POWERS

As soon as the science of government began to be studied, men saw that government has various functions. Aristotle, in Book IV of "The Politics," approached the modern conception "All States," he said, "have three elements and the good law-giver has to regard what is expedient for each State. When they are well ordered, the State is well ordered, and as they differ from one another, constitutions differ. What is the element, first, which deliberates about public affairs; secondly, which is concerned with the magistrates and determines what they should be, over whom they should exercise authority, and what should be the mode of electing them, and thirdly which has judicial power?" Logical as was this analysis, Aristotle's fellow-citizens attached no importance to it, or at any rate they drew no deductions for practical application. Judge Kent, believing that "the structure and history of the Athenian democracy has much to warn, and very little to console the friends of freedom," went on to aver: "From the incurable defect, among others, of the want of a due and well-defined separation of the powers of government into distinct departments, that celebrated republic became violent and profligate in its career, and ended in despotism and slavery. The general assemblies of the people, without any adequate checks, assumed and exercised all the supreme powers of the state, legislative, executive, and judicial."<sup>1</sup>

Rome also, while developing an elaborate specialization of governmental activities, followed no recognized principles of delimitation. No trace of instinctive recognition of such principles is to be found in the history of the barbaric tribes whence sprang our own institutions. Tacitus tells us that before a national council of Germany it was allowed to exhibit accusations and to

<sup>1</sup> *Commentaries*, I, 232 note (1826)

prosecute capital offences. Maine, ignoring Aristotle, thinks the different natures of the executive and legislative powers were not recognized till the fourteenth century, when he finds them discriminated in the "Defensor Pacis" of the great Ghibelline jurist, Marsilio de Padova (1327), with other curious anticipations of modern political ideas. John Locke, in the second of his "Treatises on Government," said (ch. xiv, par. 159) that in all well-framed governments the legislative and executive powers are in distinct hands. Not quite so sharply did he set it forth that the judicial power should also be distinct, but from his discussion it is to be gathered such was his belief.

It was reserved for a French lawyer, philosopher, and critic, Montesquieu, to lay clearly before the world the doctrine of the separation of powers, and thereby to shape the destinies of mankind. His epoch-making work, "The Spirit of Laws," the result of twenty years of study, was published at Geneva in 1748. It passed through twenty-two editions in a year and a half. It was read by thinking men in every land. Instantly it conquered rank among the few books that have dominated thought.

The remarkable thing is that this book, which in the matter of separating powers might almost be called the corner-stone of our governmental structure, did not contain and did not profess to contain anything new either in theory or in practice. The merit of it lay in the skill with which the author ascribed to the government of England a virtue possessed by that government in far less degree than he supposed, and which since then has there dwindled almost to the point of disappearance. Praising what he thought he saw, he encouraged a people he did not have in mind at all, to transform his delusion into one of the most important political facts in all the history of the world.

With such a consequence, it is worth while observing just what Montesquieu argued. Said he:

"In every government there are three sorts of power: the legislative, the executive in respect to things dependent on the law of nations, and the executive in regard to matters that depend on the civil law.

"By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have already been enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes crim-

inals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power.

"The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined with the executive power, the judge might behave with violence and oppression " <sup>1</sup>

It will be noticed that after some vagueness in the use and application of the word "executive," he reached a clear statement of the limitations as we now understand them, with a strong exposition of the reasons for observing these limitations. The reasons were what caught the attention of the world. Forthwith other great writers began discovering like benefits and dangers. A dozen years or so after "The Spirit of Laws" appeared, Rousseau took up the theory, saying "If he who rules men ought not to control legislation, he who controls legislation ought not to rule men, otherwise his laws, being ministers of his passions, would often serve only to perpetrate his acts of injustice, he would never be able to prevent private interests from corrupting the sacredness of his work. When Lycurgus gave laws to his country, he began by abdicating his royalty. It was the practice of the majority of the Greek towns to intrust to foreigners the framing of their laws. The modern republics of Italy often imitated this usage, that of Geneva did the same and found it advantageous. Rome, at her most glorious epoch, saw all the crimes of tyranny spring up in her bosom, and saw herself on the edge of destruction, through uniting in the same hands legislative authority and sovereign power." <sup>2</sup>

Then, in 1765, Blackstone adopted the argument, putting it into the Commentaries that for generations were to be studied

<sup>1</sup> *The Spirit of Laws*, bk. xi, ch. 6.

<sup>2</sup> *The Social Compact*, bk. 2, ch. vii.

by every English-speaking man entering the profession dominant in public life. In like vein he held. "In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself"<sup>1</sup> And farther on: "Were the judicial power joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance of the executive"<sup>2</sup>

It is singular that Blackstone could have written this with before him the palpable contradiction of the House of Lords serving as the highest court in England. What he had in mind to approve, however, was "a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown," which was, to be sure, the essential part of the English judiciary. Independence had always been sought by excluding the common-law judges from sitting in the House of Commons. The exclusion was extended to the Scotch judges under George II, and to the Irish judges under George IV. All newly created judges have been thus disqualified by the acts creating their positions. The Commons at their own request got rid of judicial duties in the reign of Henry IV. Nevertheless, they are still treated as a court, the decisions of which are respected by other judges, even when believed by them to be erroneous. As illustrative of the practical effect, it is pointed out that the Speaker of the House of Commons is not liable to a suit in the courts for a trespass that he has committed under the order of the House. In the United States the rule is otherwise.<sup>3</sup>

If the Montesquieu doctrine were the fallacy averred by present-day critics, is it not surprising that no inkling thereof had penetrated the brain of Daniel Webster, after the experience of

<sup>1</sup> *Commentaries*, I, 146

<sup>2</sup> *Ibid*, I, 269

<sup>3</sup> Roger Foster, *Commentaries on the Constitution of the United States*, I, 454.

the States and the nation in living under it for nearly two generations? Our greatest Senator addressed himself to the subject May 7, 1834. "The first object of a free people," he said, "is the preservation of their liberty, and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power. Nothing is more deceptive or more dangerous than the pretence of a desire to simplify government. The simplest governments are despotisms, the next simplest, limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority, and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions ... Every free government is necessarily complicated, because all such governments establish restraints, as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches, and have but one branch, if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge, and if we will place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our Constitutions; and, doubtless, the continuance of regulated liberty depends on maintaining these boundaries"<sup>1</sup>

After yet another generation of experience, Elisha Mulford, one of our wisest masters of political science, found the same basic danger in the union of powers. Said he. "When one power destroys the others, or assumes their offices and capacities, or usurps their functions, and there remains only the unrelated and unlimited action of a single and separate power, the consequence is again the same — the destruction of freedom. In the French revolution, the legislative destroyed the executive power, and then the executive in turn destroyed the legislative, and this subversion of the organization of the whole left the way open to an imperialism"<sup>2</sup>

Again proceed a generation, and observe how history presents itself to a thoughtful commentator on constitutional law, Roger Foster. Admirably he sets forth the view that the legislative,

<sup>1</sup> *Works*, iv, 122.

<sup>2</sup> *The Nation*, 178.

executive, and judiciary cannot be combined without the creation of an arbitrary government.

"That the authority to make an act a crime, to condemn for its commission, and to execute the sentence, when united in a single man, make him a despot, and that human passions are too strong to keep him from an abusive use of such strength, are universally admitted, without the need of any reference to history. That when these powers are vested in one body of men, that body usually degenerates into a mob, unrestrained by any consideration of justice or moderation, is less generally recognized, because the instances are rarer; but it is universally conceded, not only by students of the histories of the democracies of Greece, but by those who have any knowledge of the proceedings of the Long Parliament and the National Convention. Their excesses are the things which have brought discredit upon government by the people.) They caused the reactions which set up innumerable tyrannies among the ancients, which restored the Stuarts, and, when they were again expelled, made the English nation import foreign kings; which, twice within the century, have made the French people voluntarily submit to an emperor, and which make many of the most intelligent of our own day still believe that no republic can endure" <sup>1</sup>

«Such have been the views until recently dominating American political thought. Now they are stoutly attacked.» For an illustration that will serve the purpose as well as any, take a paragraph from an address to the Academy of Political Science by Ogden L. Mills, one of the ablest public men of our time. "The separation of powers," he declared, "was imposed upon us when conditions were entirely different from our present conditions. It was accepted under an erroneous impression of the English Constitution which we were following. There is no valid argument in favor of it at present except conservatism or stagnation. Why should we not give it up? Is there any reason why the greatest State in the Union should not set the example of surrendering this outworn and useless formalism? Where are the defenders of this separation of powers? Who brings forward any reason why it should survive?"

The challenge must be met. It is the challenge of a large body of men holding positions of great influence as instructors of the youth of the land, a challenge approved by many who are ac-

<sup>1</sup> *Commentaries on the Constitution of the United States*, 1, 302.

tively engaged in modifying our political institutions. Let it be faced

Notice first the error in the premises as Mr. Mills gave them. The authors of our Constitutions were not following the English Constitution. They were developing their own institutions, not copying, not creating, but expanding. Conditions of their day differed no whit from those of the present so far as concerns the vital element, human nature. Since history began there has been no change in the impulse of men to grasp power, all the power they can get. Has the truth and bearing of this ever been better put than in Washington's Farewell Address? "The spirit of encroachment," he declared, "tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation, for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."<sup>1</sup>

Whether or not these words were written by Washington, whether or not Hamilton was their real author, their truth is as vital to-day as it was when they were penned.

The difficulties with Congress had given both Washington and Hamilton fresh reason for appreciating the force of what Madison had said in concluding Number 48 of "The Federalist." After setting forth the violations of the Pennsylvania Constitution discovered by its Council of Censors, he commented: "A mere demarcation on parchment of the constitutional limits of

<sup>1</sup> *Writings*, XII, 226.



the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands " With these encroachments the authors of our early Constitutions were personally familiar. They provided against evils they knew, and did it not because Montesquieu thought it had been done in England, but because it needed to be done in America.

#### EXECUTIVE AND LEGISLATIVE

To get proof that our constitution-makers were in this matter motivated chiefly by their own experience and that of their fathers through a century and a half, the history of colonial development should be examined.

At the outset the Councils or their equivalents were in the nature of Boards of Directors of mercantile corporations. Speedily isolation and remoteness from the home land shaped them into bodies with two conspicuous functions — one, that of advising the Governors, the other, that of sharing in the making of laws. Here, then, was complete blending of executive and legislative duties.

Furthermore, through much of the colonial period it was common for the Governor to sit with the Council, thus taking a share in the making of the laws he was to execute. In the first Virginia Assembly, that of 1619, he seems to have made motions like any other member. The royal instructions to Governor Culpepper of that colony in 1682 directed that "all bills should be drafted by the Governor and Council." Nicholson, who was in Virginia as Lieutenant-Governor and then Governor from 1690 to 1692 and again from 1698 to 1705, had much trouble with his Councillors, who finally secured his recall. Their charges were undoubtedly partisan and extreme, yet something is to be inferred from one as to "His Behaviour in the Upper House of Assembly." It read "IV. His Closeting of the members and using all the arts of Cajoling and threatening for his own ends, not sticking sometimes to threaten the cutting of their throats and their utter ruin, we take to be another intolerable encroachment on the Liberties of that House."

The Massachusetts Bay Charter made the Governor and Deputy Governor part of the General Court. The Governor presided, or in his absence the Deputy Governor. He had little more power than the other members. If he refused to put a

question to vote, it could be put by any other member. The second charter gave the Governor the veto power, but did not disclose whether he was to share with the Council in the making of laws. Lord Bellamont, who came to Boston from New York in 1699, assumed the right. Hutchinson tells us about it. "There was," he says, "something singular and unparliamentary in his form of proceedings in council, for he considered himself as the head of the board in their legislative as well as executive capacity. He concerned himself in all their debates, proposed all business, and frequently recommended to them to resolve into a committee upon bills or clauses in bills, and then, as the entries stand, he left the chair, and the committee (being ready to report) reassumed, nor did he think it proper they should act as a house of parliament in his absence, but when detained at home, by messages from time to time, directed their going into a committee and preparing business against such time as he should be able to attend. This was guiding them in all their debates and resolves, as far as his influence would extend, which was not a little way, and yet afterwards, as a separate branch, he had his negative upon all their proceedings which were not according to his mind. This irregularity does not seem to be the mere effect of his lordship's authority and influence over the Council. The constitution under the new charter was not settled. They came off by degrees from their practice under the old charter. The Governor, created by the people, used then to vote with the Assistants, and although he had no negative, yet he had a casting voice. Lord Bellamont finding this to have been the practice, and, considering how much it increased his share in all acts of government, might be disposed to retain it. Experience taught, what was not at first conceived, the great difference between the privilege of proposing or originating and that of rejecting. In some succeeding administrations, it has given cause of exception and complaint when the Governor has interested himself in the debates of the Council, to influence their determinations and abridge them of that freedom to which they are equally entitled with the other branches of the Legislature."<sup>1</sup>

Governor Dudley took the same position as Lord Bellamont in the matter of presiding and of directing upon what business the Council should proceed, but subsequent Governors neglected to assert the right and the practice fell into disuse.

<sup>1</sup> *History of Massachusetts*, 3d ed., II, 106.

It was evidently meant that the Lieutenant-Governor should be an *ex officio* member of the Upper House under the second charter as he had been under the first. Mr Stoughton, the first Lieutenant-Governor under the second charter, though not at first elected a member of the Council, was treated as a Councillor and voted, and was upon committees the whole year. At the second election he was regularly chosen one of the Councillors as well as Lieutenant-Governor, and was therefore doubly entitled to a seat in that body. His immediate successors also attended the meetings of the Council whether so elected or not, but they voted in its proceedings only when elected as Councillors. In 1732 the right of the Lieutenant-Governor to a seat in the Council when sitting in its legislative capacity was challenged in the case of Mr Phipps, who having been elected Lieutenant-Governor against the desire of the Governor, was forbidden by the Governor to sit in that body "unless he should be elected by the Assembly and approved by the Governor." The question was settled in 1767 when Lieutenant-Governor Hutchinson failed to be elected to the Council. Hutchinson says he was in constant attendance upon the meetings of the Council during the first session after his defeat, but "did not vote nor take any share in the debates." At the second session, however, his attendance was characterized by the House as "a new and additional instance of ambition and lust of power." In spite of the efforts of the Governor and other friends, the House successfully maintained its position and the Lieutenant-Governor ceased to be a member of the upper branch of the Legislature *ex officio*.

Only a remnant survives of the records of the first Assembly in Maryland (1635), but undoubtedly the Governor, styled the Lieutenant-General, sat and voted in it, as he surely did in the second Assembly (March, 1637-38).<sup>1</sup> He was deemed to be a member of the Upper House until after 1675.

Under the quaint and complicated "Fundamental Constitutions of Carolina" (1669), framed by John Locke with the help of the Earl of Shaftesbury, only partly put into effect, and abrogated in 1693, the eight Lords Proprietors, of whom the eldest was to be the "Palatine" (presumably equivalent to "Governor"), together with forty-two Councillors, were to prepare all matters to be proposed in the Parliament, which could only

<sup>1</sup> *Archives of Maryland*, I, 9.

assent or reject. When, under a more normal form of government, the law officers of the Crown found that Governor Burrington of North Carolina, in the course of his second administration (1731-34), had sat with the Councillors while the Legislature was in session, and had discussed bills, they rebuked him, telling him his sole function was to allow or disallow bills, and that he must not meddle with the Assembly. In South Carolina the Council made this entry on its Journal of April 11, 1739: "The Governor or Commander-in-Chief being present during the debates of this House is of an unparliamentary nature, it is therefore resolved we will not enter into a debate during his presence." Governor Glen, arriving in 1743, objected to this doctrine and made a speech declaring he had the same right to attend as the King had to be present in the House of Lords. Thereupon the Council agreed he might be present, but he must never take any part in the debates nor so much as receive any messages coming to their House or make any answers thereto. In spite of the rebuff, Glen attended meetings from time to time for several years. Then, after keeping away for a while, in 1756 he came into the chamber when a message he had sent was being read, whereupon the further reading was postponed and the House adjourned till the afternoon. That seems to have ended the conflict.

In some instances the colonial charters definitely gave the Executive the lawmaking power. Thus the charter of Maryland in 1632 said "VIII. And forasmuch as, in the Government of so great a Province, sudden accidents may frequently happen, to which it will be necessary to apply a Remedy, before the Freeholders of said Province, their Delegates, or Deputies, can be called together for the framing of Laws, neither will it be fit that so great a Number of Persons should immediately, on such emergent Occasion, be called together, We therefore" grant to Lord Baltimore the power of making "fit and Wholesome Ordinances from Time to Time," etc. It will be noticed that this was carefully phrased as an emergency power. In 1663 the charter to the Carolina proprietors and in 1681 the charter to William Penn, for Pennsylvania, granted the same power, likewise on emergency grounds. The privilege was rarely if ever exercised. Penn threatened to use it and lost popularity thereby. In Virginia the Assembly had to pass a formal act in 1624 declaring expressly that the Governor was not to make laws without the

consent of the Assembly, and his right so to do was again expressly denied in acts of February and September, 1632.

New York began under English rule with a code of laws promulgated by Governor Nicolls, personal representative of the Duke of York, whose patent authorized him to make all laws and carry on the government. Nicolls called together an assembly of two men from each town, thirty-four delegates appearing, to consider the code, but as they had no choice save to approve, that was an idle formality. Not until the Assembly of 1683 was it declared that, under the King and the Lord Proprietor, the supreme legislative authority should "forever be and reside in a Governor, Council, and the people met in general assembly." The law officers of the Crown decided in 1725 that a Governor could not act as a Councillor when the Council was legislating. Nevertheless, when in 1729 Lewis Morris, Jr., a member of the Council in New York, wrote a long fault-finding letter to the Lords of Trade, he found occasion to criticize Governor Montgomerie for that very thing. Morris gave it as his opinion that the share of the Governor in the making and passing of laws had "contributed more toward depreciating the Council and rendering that part of the Legislature almost insignificant, than anything else, and is one great cause (if not the only one) of the extravagant steps taken by the Assembly." Thereupon the law officers ruled squarely against the practice. A few years later (1738) Morris became Governor of New Jersey, and one of his first acts was to assure the Assembly that he would refrain from attending meetings of the Council. His successor, Belcher, tried in 1746 to establish the right of attendance, though without voting, but by reason of the opposition of Morris, abandoned the attempt.

The share in lawmaking given to the colonial executives by the veto power is of course another matter. Lord Baltimore went beyond it and got into trouble by asserting that he had the right to give his function precedence over that of the Assembly; in other words, that his was the initiative. When the first Assembly in Maryland, in 1635, drew up a body of laws and sent it to England, Baltimore declined to give his assent. When he caused a dozen bills to be submitted to the second Assembly, in 1638, that body paid him back in his own coin, rejecting them all. Then he in turn rejected all the laws passed by the Assembly, but presently changed his mind, and the first business

of the next session was to listen to a letter from the proprietor in which he authorized the Governor to assent to acts originated by the Assembly, and said they should be in force until Lord Baltimore or his heirs dissented

While Benning Wentworth was Governor of New Hampshire (1741-67), a long and determined contest took place between him and his Council on one side and the Assembly on the other, over two constitutional questions, the first being whether it was within the Governor's prerogative to veto the election of a Speaker by the House of Representatives, and the second being whether it was the prerogative of the Governor or the General Assembly to authorize new constituencies to send Representatives. This conflict prevented the enactment of any legislation throughout the entire term of one General Assembly. The points in issue were not definitely decided

The matter of salary brought numerous conflicts. In Massachusetts, Governor Shirley, a few months after taking office, sent to the General Court a lengthy message developing the charge that the grant of money to him was not conformable, "either in respect of the sum or manner of granting it, to his Majesty's instructions concerning that matter to his two late Governors." He declared: "The nature of the British Constitution, which consists in the three branches of the Legislature, requires that such an independency should be preserved in each of 'em, as is necessary to support its own dignity and freedom." Thereupon the House retorted with the other edge of the constitutional argument, saying: "The strength and beauty of the British Constitution chiefly consists in that mutual check which each branch of the legislature has on the others." Thus seven years before Montesquieu's book was published, Governor and Legislature were here arguing the theory of checks and balances. The Governor emphasized the balances. The House emphasized the checks, declaring: "There ought not to be an independency in either branch of the legislature, forasmuch as to be independent and arbitrary are the same things in civil polity."

In passing, notice that the Governor by speaking of "others" indicated his belief that the legislature had three branches, and that the House, if it used "either" accurately, thought there were but two. Each treated the Governor as part of the legislature. In fact Shirley said "His Majesty is the head of the Legislature here, and the Governor is but his officer." The

point is not without significance in connection with present-day controversies as to what the framers of our Constitutions meant when they used the word "legislature", as, for example, the question whether a legislature may redivide a State into Congressional districts without giving the Governor chance to veto, or whether the electorate, using the initiative and referendum may be a "legislature" within the purview of the Federal Constitution.

Notice also that neither Governor Shirley nor the House recognized the judiciary as a branch of the government.

Anyone familiar with no more than the outlines of our colonial history knows that the quarrels between Governor and Legislature were among the most considerable happenings that led up to the Revolution. Each complained bitterly of the other and often with good ground. The tale of how they trespassed on each other's prerogatives is not altogether cheerful, though often humorous. The legislators were a jealous set, punctilious, sometimes pompous, yet beneath their vanities and their quibblings ran deep currents of political thought that were to bring momentous results.

It was out of the depths of bitter experience that came the governments they framed. He greatly errs who thinks the Constitutions were the work of inventors. To be sure, the thoughts of their authors were stimulated by the philosophers of the time. They read Blackstone. Some of them may have read Rousseau. John Locke's writings had not been forgotten. It has been said that Montesquieu gave them their political Bible. Yet I doubt if after all it was not prudent deduction from personal experience that led them to most of their conclusions. For instance, despite their hatred of Governors, they were shrewd enough to know it was just as important to protect the executive as it was to protect the legislative. In 1757 the Board of Trade had written in regard to the Massachusetts government "Almost every act of executive and legislative power, whether it be political, judicial, or military, is ordered and directed by Votes and Resolves of the General Court, in most cases originating in the House of Representatives."<sup>1</sup> Yet the town meeting of Boston in May of 1776 had wisdom enough to say to the Representatives of the town in the course of formal instructions "It is essential to Liberty that the legislative, ju-

<sup>1</sup> *Massachusetts Province Laws*, IV, 95

dicial, & executive powers of Government be, as nearly as possible, independent of & separate from each other."

#### UNDER THE CONSTITUTIONS

At this very time the Virginia Convention was drafting its Declaration of Rights, specifying a separation of powers. Such were then the delays in communication, however, that it is not probable either Virginia or Boston knew what the other had said. Quite independently, it is to be presumed, their minds worked toward the same conclusion. The Virginia Declaration of Rights asserted. "The legislative and executive powers of the State should be separate and distinct from the judiciary." Under Frame of Government the demarcation was made complete. "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other." Maryland said much the same in November. North Carolina spoke to the same effect in December, with the suggestive exception that it put the word "supreme" before "judicial," as if there were no harm in having the minor judicial powers exercised by Legislature or Governor. Georgia, however, in the following year took the Maryland view *in toto*, emphasizing it by adding, "so that neither exercise the powers properly belonging to the other."

Should you surmise that these were perfunctory generalities, should you imagine in them an academic flavor, should you doubt whether they were the deliberate, carefully premeditated utterances of intensely earnest men, turn to that memorable pamphlet on the "Result of the Convention of Delegates Holden at Ipswich," when the Constitution framed by the General Court of Massachusetts in 1778 had aroused great opposition, especially in the towns of Essex County. This pamphlet, known as "The Essex Result," is believed to have been written by Theophilus Parsons, afterward Chief Justice, one of the great men of his time. It had much to do with the overwhelming defeat of the Constitution in the town meetings, and one of its chief criticisms was that "the executive power in any State ought not to have any share or voice in the legislative power of framing the laws."

The pamphleteer pointed out certain articles obnoxious on this ground. They provided that the Governor and Lieutenant-Governor should each have a seat and voice in the Senate, the



Governor presiding, or in his absence the Lieutenant-Governor; that all civil officers getting salaries should be elected by the General Court, that other civil officers and those of the militia should be appointed by the Governor and Senate; that the Governor and Senate should be the court of impeachment; and that the Senate could not proceed with business unless the Governor or Lieutenant-Governor were there. Parsons declared (p. 25): "Should the executive and legislative powers be united, mischiefs the most terrible would follow. The executive would enact those laws it pleased to execute, and no others. The judicial power would be set aside as inconvenient and tardy. The security and protection of the subject would be a shadow. The executive power would make itself absolute, and the government end in a tyranny."

Two years later, John Adams, who was in thorough sympathy with the ideas of the rustic statesmen of Essex, drew the Constitution that met public acceptance, with a statement of the doctrine which by reason of its unequivocal expression and sonorous phrasing has become famous: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them, the executive shall never exercise the legislative and judicial powers, or either of them, the judicial shall never exercise the legislative and executive powers, or either of them, to the end it may be a government of laws and not of men."

Not all the statesmen of that day, however, believed such clear-cut demarcation to be possible or desirable. When New Hampshire came to copy much of the Massachusetts Constitution, it substituted in this particular: "In the government of this State, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from and independent of each other as the nature of free government will admit, or as is consistent with that chain of connection, that binds the whole fabric of the Constitution in one indissoluble bond of union and amity."

The problem received noteworthy attention in Virginia. The Declaration of Rights of 1776 did not achieve the desired result, or at any rate so thought Thomas Jefferson. When he wrote his "Notes on Virginia" (1782) he pointed out six "very capital defects" in the Constitution, which he thought time and trial had discovered, and one of them he thus described: "All

the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the Republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for, but one which should not only be founded upon free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."

The Federal Constitution was adopted while Thomas Jefferson was in France. Upon his return he found the new Constitution not to his liking in sundry particulars, and he was particularly aggrieved because it did not more clearly define and guard the powers of the three departments of government. It chanced that John Breckenridge and George Nicholas, visiting him at Monticello, informed him that Virginia was going to let Kentucky become an independent State, and that the Kentuckians were about to frame a Constitution, whereupon Jefferson framed a provision that would meet his views in this matter. Nicholas took it to the Kentucky Convention, where it aroused much discussion and dissent, but the great name of Jefferson carried it through. Originally placed at the very forefront of the Kentucky Constitution, the two sections given to it read:

"1. The powers of government shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judiciary to another.

"2. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted."

Governor Randolph of Virginia, speaking June 16, 1788, in the Convention for ratifying the Federal Constitution, though not criticizing the Virginia instrument, took a position as positive as that of Jefferson. "Are we not," he said, "taught by

reason, experience, and governmental history, that tyranny is the natural and certain consequence of uniting these two powers [legislative and executive], or the legislative and judicial powers, exclusively, in the same body? If any one denies it, I shall pass him by as an infidel not to be reclaimed. Whenever any two of these three powers are vested in one single body, they must, at one time or other, terminate in the destruction of liberty " <sup>1</sup>

When a new Constitution was framed for Virginia, in 1830, its first Article said that in the opinion of the Convention the Declaration of Rights of 1776 required no amendment, and then the second Article went on to amend it, to read "The legislative, executive, and judicial departments shall be separate and distinct."

Meantime the doctrine had been largely responsible for leading one State to abandon the colonial charter under which it had lived for a century and a half. Connecticut, on throwing off royal authority, did not frame a Constitution at once. Indeed, not until 1818 did it feel the necessity of pursuing the course already followed by all the other States save Rhode Island. Said Justice Hamersley in *Norwalk Street Railway Company's Appeal* (69 Conn 64, 1897). "Prior to 1818 the whole sovereign power was exercised by the people, unrestrained by anything except their present will, through a body of magistrates chosen annually and deputies chosen semi-annually. This was democracy, as close to a democracy as it is possible for a representative government to be. The idea of a Constitution was centered in the separation of judicial and legislative powers, and the grant of each power to a distinct magistracy. On this the fight for change of government was largely made. When the Legislature that called the Convention of 1818 met, Governor Wolcott told them that their mandate from the people was, 'that the legislative, executive, and judicial authorities of our own government be more precisely defined and limited, and the rights of the people be declared and acknowledged'"

Of the Constitutions adopted before the Federal Convention, those of Virginia, Maryland, North Carolina, Georgia, Massachusetts, and New Hampshire, in the order named, specified separation of powers, that of Virginia, however, directing only that the legislative and executive be separate from the judicial (a provision that Jefferson seems to have ignored). The Federal

<sup>1</sup> *Elliot's Debates*, III, 83

Constitution did not meet the case by specific prohibition, but it is held that the doctrine is none the less clearly embodied therein, by its affirmations: "All legislative powers herein granted shall be vested in a Congress", "the executive power shall be vested in a President", "the judicial power of the United States shall be vested in one Supreme Court." Nine of the States have handled the matter after that fashion, save that one of them, New York, for some reason I have been unable to ascertain, omitted specification as to the judicial branch. All the other States now explicitly specify separation. Some of them, however, recognize exceptions made by their Constitution itself

No one can read the debates in the Federal Convention of 1787 without coming to realize that the well-considered purpose of its leaders was to keep the powers as separate and distinct as practicable. Again and again they showed this in discussing various of the basic problems. They believed that, as Madison put it in "The Federalist" (Number 47), "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." By reason of their own experience as well as from their wide knowledge of what had taken place in other lands, they were determined that save in a few unessential particulars the three powers should not be blended and that each should be protected against the other two.

The reader who in spite of all this persists in thinking that the powers were separated in America by imitative theorists and that no conditions anywhere in our own time justify them, may profitably note what Walter C. Simons, former President of the Supreme Court of the German Republic and intimately associated with the constitutional problems of the Reich, told the American Bar Association at Memphis. "The division of the powers as the dominating idea of our Constitution," he declared, "is not the result of a learned theory or scientific reasoning, it is for Germany as it was for New England, the lesson learned by hard political experience."<sup>1</sup> The German Constitution was not long to endure. Observe that German democracy vanished when the powers were seized and united by one man, a Chief Executive, a dictator.

<sup>1</sup> *American Bar Association Journal*, December, 1929

The Constitutions drawn up in the new American States in the first months of independence gave the Chief Executive but the shadow of power. They show clearly the effect of the fresh memory of Colonial Governors. A decade or more of experience under these earliest Constitutions appears to have reversed apprehensions so much that the chief fear of the authors of the Federal Constitution was not of the executive but of the legislative branch. Said John F. Mercer of Maryland "What led to the appointment of this Convention? The corruption and mutability of the Legislative Councils of the States. If the plan does not remedy these, it will not recommend itself." Gouverneur Morris talked of legislative tyranny, considering the public liberty in more danger from legislative usurpations than from any other source. Madison declared that experience in all the States had evinced a powerful tendency in the Legislature to absorb all power in its vortex. "This was the real source of danger to the American Constitutions." He suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.

We find the authors of "The Federalist" frequently adverting to their belief that the great danger was to be found in encroachments by the legislative. For instance in Number 51 they say "In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches, and to render them by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." In Number 71 Hamilton says "In governments purely republican this tendency [of the legislative authority to absorb every other] is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter, as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear to exert an imperious control over the other departments, and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution."

The change in emphasis is well illustrated in the powerful "Letter of an Elector," by that North Carolina statesman, James Iredell, printed at Newbern, August 17, 1786, the year before the Federal Convention

"*To the Public:* As the question concerning the power of the Assembly deeply concerns every man in the State, I shall make no apology for delivering my sentiments upon it . . . I have not lived so short a time in the State, nor with so little interest in its concerns, as to forget the extreme anxiety with which all of us were agitated in forming the Constitution . . . It was, of course, to be considered how to impose restrictions on the Legislature, that might still leave it free to all useful purposes, but at the same time guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British Parliament, but had severely smarted under its effects. We felt in all rigor the mischiefs of an absolute and unbounded authority, claimed by so weak a creature as man, and should have been guilty of the basest breach of trust, as well as the grossest folly, if in the same moment when we spurned at the insolent despotism of Great Britain, we had established a *despotic* power ourselves. Theories were nothing to us, opposed to our own severe experience. We were not ignorant of the theory of the necessity of the Legislature being absolute in all cases, because it was the great ground of the British pretensions. But this was a mere speculative principle, which men at ease and leisure thought proper to assume. When we were at liberty to form a government as we thought best, without regard to that or any theoretical principle we did not approve of, we decisively gave our sentiments against it, being willing to run all the risks of a government to be conducted on the principles then laid as the basis of it. The instance was new in the annals of mankind. No people had ever before deliberately met for so great a purpose. Other governments have been established by chance, caprice, or mere brutal force. Ours, thank God, sprang from the deliberate voice of the people. We provided, or meant to provide, (God grant our purpose may not be defeated,) for the security of every individual, as well as a fluctuating majority of the people. We knew the value of liberty too well, to suffer it

to depend on the capricious voice of popular favor, easily led astray by designing men, and courted for insidious purposes " <sup>1</sup>

So stoutly did the American statesmen of the revolutionary era frame their Constitutions, so strict and jealous was the interpretation thereof by such judges as John Marshall, that in the outcome the legislative branch was duly fettered. Yet that the fear continued is shown by the wording inserted in the Ohio Constitution when in 1851 it was rewritten "The General Assembly shall grant no divorce, nor exercise any judicial power not herein expressly conferred." The significance of the second phrase of this lies in the fact that the old Constitution had provided and the new one repeated that the judicial power should be vested in a supreme court. They put up a second wall.

Thirty years later, a century after the Revolutionary period, the judiciary still thought the legislative branch the more dangerous, judging by what the Court said in the case of *Kilbourn v. Thompson*, 103 U. S. 168 (1880), where the judicial view of the doctrine of the separation of the powers was set forth. *Kilbourn* had sued the Speaker, the Sergeant-at-Arms, and member of a committee of the House of Representatives for damages by reason of imprisonment because he refused to testify. The Supreme Court held the legislative branch had entered upon an investigation judicial in its nature. The Court took the opportunity to say that the House, by reason of its power to originate bills for raising revenue and to share with the Senate in declaring war, as well as by reason of its size, was least liable to encroachment, and that by reason of its origin and of its short term, its action was least likely to be received with distrust, and therefore that it most needed to be "watched with vigilance."

The Constitutions of Massachusetts and Maine in their general grants of power authorize the Legislature to make "reasonable" laws, and it is hardly to be questioned that if there is to be interpretation of "reasonable," it must be by the judicial branch. With "wholesome" in the Massachusetts document the recourse is not so clear, for that is matter of wisdom rather than of right; were it taken to be more than admonitory, it would seem to impose legislative duties on the judiciary. Fourteen of the other Constitutions give to the legislative branch the powers necessary for the legislature of a free State, one of them, Vermont, making it a free and sovereign State. Georgia specifically permits its

<sup>1</sup> *Life and Correspondence of James Iredell*, II, 145, 116

Legislature to make those laws consistent with the State and not repugnant to the Federal Constitution "which they shall deem necessary and proper for the welfare of the State." Oklahoma limits to "rightful subjects of legislation," and "rightful" no doubt brings in the courts. The other States say where "the legislative power" shall vest or by establishing a legislative department leave its duties to inference.

Possibly the framers of the Constitutions did not foresee the opportunity their vague terms would give to the judicial branch to curb the legislative. Possibly, on the other hand, giving the opportunity was meant, as one of the checks and balances. Anyhow the tendency of State courts to restrict the Legislatures as far as possible to the constitutional powers granted expressly is apparent. The maxim, "*Expressio unius est exclusio alterius*," has had singular application for this purpose. The result of strictly confining our lawmaking bodies to the powers definitely granted, has been of doubtful benefit. The more the field of work is narrowed, the less the interest. There may be too much fear of the legislative branch on the part of the others. As for the public, fear of the judiciary is getting the more attention.

### THE COLONIAL JUDICIARY

There is nothing to indicate that the American colonists at the outset saw any ethical difficulties in the commingling of powers. That it endangered liberty was an idea apparently not entering their heads until Montesquieu put it there. Both in England and here the development was one of expediency, due to considerations of practical convenience, embodying principles of right only as the expedient thing is, according to some schools of philosophy, the right thing at any given time and place, although the same thing may be the inexpedient and therefore the wrong thing at some other time and place. Whether that doctrine be valid or not, it is clear the gradual separation of powers in this country proceeded from motives of convenience, in strict accord with the principle of specialization.

Thus the setting apart of the judicial function was the natural result of growth of population and litigation. Of course at first there was not enough work to warrant a judiciary. So there was nothing abnormal in what took place on the fourth day of the first American representative assembly, at James City, Virginia, in 1619. The record shows that Captain William Powell pre-



sented a petition against one Thomas Garnett, a servant of his, "not only for extreme neglect of his business to the great loss and prejudice of the said Captain, and for openly and impudently abusing his house, .. but also for falsely accusing him to the Governor both of Drunkenness & Theft It was thought fit by the general assembly (the Governor himself giving sentence), that he should stand four days with his ears nailed to the Pillory — and every of those four days should be publicly whipped "

The same grasp of justice was taken by the first "Court of Assistants" held by the Massachusetts Bay Colony in New England, August 23, 1630 — that is, the meeting of those then virtually the Directors of the corporation, later to become the Upper House "It was ordered that Morton, of Mount Woolison, should presently be sent for by process," and at the second meeting of the Court, it was ordered that the disgraceful Morton should "presently be set into the bilbowes, & after sent prisoner into England " At the first General Court (or stockholders' meeting) Walter Palmer, charged with manslaughter, made his appearance and was bound over to the next Court Whether a Court of Assistants or a General Court, there was no discrimination whatever between business legislative, administrative, or judicial, nor does it appear that for some years there was any discrimination between the judicial powers of the Assistants and of the General Court

By 1639, however, it was found the business of the ordinary Court of Assistants had so increased that it was best to let those residing in or near Boston, "or any 5, 4, or 3 of them, the Governor or Deputy to be one," hear and determine all civil causes whereof the debt or trespass or damages did not exceed twenty pounds, and all criminal causes "not extending to life."<sup>1</sup> In practice this did not enough relieve the General Court from the burden of hearing minor causes, so in 1642, declaring that its function was "only to help in such cases where the party can have no relief in any other Court," it directed all causes first to be tried in some inferior court, and said they should not be brought to the General Court unless after a new trial on a writ of review the loser thought justice had not been done him.<sup>2</sup>

With the growing judicial power of the Assistants, they came

<sup>1</sup> *Records of the Colony of the Massachusetts Bay in New England*, I, 276

<sup>2</sup> *Ibid* , II, 16

to be commonly spoken of as the Magistrates. A judicial caste was in the forming. Perhaps it was their desire to monopolize authority that led to the query put to the elders in 1644 as to whether the charter gave the General Court any judicial rights at all. The elders could not find that the charter gave it "power of judicature, if we speak of the constant and usual administration thereof," but they thought it had the right to hear appealed and reserved cases.<sup>1</sup>

Ten years later, again from motives of expediency, the General Court took further steps to protect itself against burdensome demands on its time. It voted, May 3, 1654: "Forasmuch as daily experience tells us that the proceedings of this Court are constantly obstructed through the introducing of several particular cases of a private nature, the work of this Court being properly to attend matters of a more public concernment, this Court doth therefore order, that no Court shall transfer the cases coming before them, proper to the cognizance of such a Court, whether they are civil or criminal, but if there be difficulty in any case, the Court shall state the question leaving out the parties names, and bring it to the General Court where it may be resolved."<sup>2</sup>

It is interesting and instructive to notice how hard the Legislature had to work to get rid of adjudicating. We are told nowadays that instinctively each department of government tries to arrogate to itself powers not its own and thereby to diminish the importance of its rivals. Surely Massachusetts colonial history does not bear this out.

After all its pronouncements, the General Court found itself still so bothered that October 18, 1659, it voted, "Whereas, according to law, all cases wherein the bench & jury does not agree in the main issue, the General Court is to determine the same, which by experience being found very burdensome to the country, it is therefore ordered, that henceforth no action of a civil nature shall, under any pretence whatsoever, come either immediately or from the County Court to the General Court, but in case of disagreement between the bench and jury, at any County Court, the case shall be determined at the next Court of Assistants, in manner following," etc.<sup>3</sup>

Possibly the separation of the legislative and the judiciary in

<sup>1</sup> *Records of the Colony of the Massachusetts Bay in New England*, II, 92.

<sup>2</sup> *Ibid*, IV, pt. 1, 184.

<sup>3</sup> *Ibid*, IV, pt. 1, 381.

Plymouth Colony took place in 1646, when, "upon the special complaint of the deputies of the towns," it was ordered that at the Court of Elections the whole body of the freemen should come together for legislating, which was to "be at that Court and the adjournments thereof only done, except the governor and assistants see cause to call a special court, and other courts to attend to matters of judicature, and the magistrates only to attend to the same."

When the two colonies were combined, the charter of 1691 continued to the General Court authority "to impose fines, mulcts, imprisonments and other punishments." Nevertheless in 1707 when the General Court had passed several acts fining Colonel Samuel Vetch and others for trading with the enemy and providing them with military stores the year before, the Privy Council annulled the acts. If the crime had been committed at all, it was in Nova Scotia and there was doubt whether it came within the jurisdiction of the Massachusetts courts. This led the Legislature to proceed by a bill of attainder. Thereupon the Queen was advised that "the crimes in the several acts mentioned" were "in no way cognizable before the General Assembly, in regard they have no power to proceed against criminals, such proceedings being left to the courts of law there." So the Privy Council ordered that the accused give security and abide by the result of "a fresh trial in the ordinary course of law." In civil causes, however, the General Court continued to exercise jurisdiction. The Province Laws contain many records of judicial action.

In Rhode Island the right of the General Assembly under the charter to act as a court of errors and appeals, and especially to control the doings of the regular courts of the colony, by prerogative powers, or to give relief as a court in chancery, though undoubtedly exercised in colonial times, seems to have been denied by the home authorities, and at times, at least, to have been repudiated by the Assembly itself.<sup>1</sup> Under their oath of office as legislators, the members of the General Assembly assumed the responsibility of judges, and it is difficult sometimes to decide from the colonial records whether the legislative or the judicial element predominated in its proceedings.<sup>2</sup>

The Fundamental Orders of Connecticut, in 1638-39, put the

<sup>1</sup> Taylor & Co v Place, 4 R I 348, note

<sup>2</sup> F L Riley, *Colonial Origins of New England Senates*, 53, note.

"power to administer justice" in the hands of the Magistrates, who were in effect the Governor's Council and a part of the lawmaking body. The charter of 1662 empowered the Governor and his Assistants to "erect and make Judicatories." For Maryland the like power had been given in the charter to Lord Baltimore in 1632. In Virginia, where "the General Court" consisted of the Governor and Council, an appeal lay from that body to "the General Assembly," consisting of the Council and the House of Burgesses. The lower branch had a Committee of Private Causes, which sat with a committee of the Council to decide upon all such appeals. The chroniclers of the time say: "There happening a Dispute between the members of the Council, that were of this Committee, and those of the House of Burgesses, The Burgesses alleging that the Council having given their Opinions in the General Court, ought not to sit on the same Causes again in a Committee of the General Assembly: The Lord Culpepper, who had a singular Dexterity in making use of all Advantages to his own Interest, did so represent this at the court of England, that he procured an Order from the King to take away all Appeals to the General Assembly."<sup>1</sup> Elsewhere the Council was generally the final court of appeal in civil cases involving more than a specified amount.

Although the tendency was toward taking judicature out of the Legislature, there was during the colonial period little attempt to take judges out of the Legislature. Hutchinson says that from 1691 to 1766 the Superior Court judges in Massachusetts Bay were with very few exceptions elected to the Council. When Governor Bernard remonstrated because the House had not thus elected a judge and the Attorney-General, the House replied with what Hutchinson called a sneer, that "they had released the judges from the cares and perplexities of politics and given them opportunity to make still further advances in the knowledge of the law; they had left other gentlemen more at leisure to discharge the duties and functions of their important offices." The Lieutenant-Governor (Hutchinson himself), who also was left out, ascribes the principal share in this to Otis, and says the flier at the judges was owing to the disappointment of the father of Otis, who had failed to receive an expected appointment to the bench. Hutchinson had at one and the same time held the offices of Lieutenant-Governor,

<sup>1</sup> Hartwell, Blair, and Chilton, *The Present State of Virginia*, 25.

Councillor, and Judge of Probate. He admitted that where the whole legislative and judicial powers are united in the same person, or the same body of magistrates, the government becomes arbitrary, yet he thought that "in a mixed government, like that of the English, judges may be, and are, members of one or other branch of the Legislature, without such danger."<sup>1</sup>

In the pre-Revolutionary period, New York tried to disqualify judges on the ground that executive and legislative powers ought not to be vested in the same persons. It was alleged, also, that in the Assembly judges had often become the leaders of factions. Nevertheless the act was disallowed (1770), on the ground that it affected the prerogative of the Crown, and did upon "reasons not applicable to the state of the colony, make a very essential alteration in its constitution."<sup>2</sup>

After the Revolution, in spite of the general acceptance of the doctrine that the powers of government should be kept separate, the legislative branch clung to some of the judicial functions. Until the Federal Constitution set the example by forbidding Congress to pass bills of attainder, they were not uncommon, nor were bills of pains and penalties. The practice of awarding a new trial by legislative act after final judgment did not at once disappear. The Senate of New York exercised appellate jurisdiction until 1846. Rhode Island, the last to abandon government under a colonial charter, was the last to abandon old practices. Although in 1780 it had declared the legislative and judicial functions incompatible, and forbidden any member of the Assembly to exercise the office of a justice of the superior court, the Assembly exercised jurisdiction of insolvency until 1832, and it was not denied appellate jurisdiction until the decision in *Taylor & Co v Place*, in 1856. The right to grant divorce continued in the Legislatures of various States for many years after their first Constitutions were framed. In Maryland, by constitutional provision, the House of Delegates may still "inquire, on the oath of witnesses, into all complaints, grievances, and offences, as the grand inquest of the State, and may commit any person, for any crime, to the public jail, there to remain until discharged by due course of law."

<sup>1</sup> *History of Massachusetts Bay*, III, 150

<sup>2</sup> E. B. Russell, "The Review of American Colonial Legislation by the King in Council," *Col Univ Studies*, LXIV, 185.

We may be sure that this process of cleaving the enacting and the applying of law, now far advanced in respect at least of the functions of American legislative bodies, has been the result of experience and not of theory. When our early Constitutions were in the making, their authors knew what had taken place when colonial Legislatures administered justice. They recalled, for instance, Anne Hibbens, tried for witchcraft in Massachusetts Bay, in 1656. The jury found her guilty, but the magistrates refused to accept the verdict. The case was carried to the legislature, the General Court, where the popular clamor prevailed. She was convicted and executed.

The Constitution-makers had read of Athenian justice, and they recalled episodes in the parliamentary history of their fatherland, for example the story of one Floyd, a gentleman though confined to the Fleet prison, who in the time of James I used some slighting word about the Elector Palatine and his wife. It appeared, in aggravation, that Floyd was a Roman Catholic. Hallam tells us<sup>1</sup> that nothing could exceed the fury into which the Commons were thrown by this very insignificant story. A flippant expression, below the cognizance of an ordinary court, grew at once into a portentous offence, which they ransacked their invention to chastise. Next day the King, through his chancellor, questioned their jurisdiction and referred them to an entry on the rolls of Parliament in the first year of Henry IV, that the judicial power of Parliament does not belong to the Commons. In the end the Lords succeeded in withdrawing the matter to their own jurisdiction, found the culprit guilty, and surpassed the Commons in punishment. Floyd was adjudged to be degraded from his gentility, and to be held an infamous person. On horseback without a saddle, with his face to the horse's tail, and with the tail in his hand, Floyd was to ride from the Fleet to Cheapside, and there to stand two hours in the pillory, and to be branded in the forehead with the letter K; to ride four days afterward in the same manner to Westminster, and there to stand two hours more in the pillory, with words on a paper in his hat showing his offence; to be whipped at the cart's tail from the Fleet to Westminster Hall; to pay a fine of £5000, and to be a prisoner in Newgate during his life. The whipping was a few days after remitted on Prince Charles' motion, but the wretched culprit seems to have undergone the

<sup>1</sup> *Constitutional History of England*, ch. vi.

rest of the sentence. As Hallam says: "This case of Floyd is an unhappy proof of the disregard that popular assemblies, when inflamed by passion, are ever apt to show for those principles of equity and moderation by which, however the sophistry of contemporary factions may set them aside, a calm-judging posterity will never fail to measure their proceedings."

Apart from the dreadful array of miscarriages where legislatures have undertaken the administration of criminal law, the pages of history give abundant proof that legislatures are unsuited to the application of either common or statutory law to litigated questions

Legislative justice ancient and modern has been studied by Professor Roscoe Pound of the Harvard Law School. He finds it has been unequal, uncertain, and capricious. In its relatively short history in this country and in the relatively small number of cases in which it has been exercised, it has shown the influence of personal solicitation, lobbying, and even corruption far beyond anything that even the most bitter opponent of our judicial system has charged against the courts in the course of a long history and after disposition of a huge volume of litigation. It has been disfigured very generally by the practice of participation in argument and decision by many who had not heard all the evidence, and participation in the decision by many who had not heard all the arguments. It has always proved highly susceptible to the influences of passion and prejudice.<sup>1</sup>

John Quincy Adams was unquestionably right in saying that a deliberative assembly is the worst of all tribunals for the administration of justice.

<sup>1</sup> "Justice According to Law," *Columbia Law Review*, Dec.-Feb., 1913-14.

## CHAPTER II

### JUDGES AS LEGISLATORS

NEXT let us consider the exercise of legislative power by the judiciary. This has been briefly treated in Chapter I of "Legislative Principles" in connection with the nature and source of law. More extended study may now be made from the point of view of the separation of governmental powers.

"To declare what the law *is, or has been*, is a judicial power; to declare what the law *shall be*, is legislative" So said Justice Thompson, in deciding *Dash v Van Kleeck*, 7 Johns 498 (1811).

~~Things would be simpler if that were true. It is not. To-day both judges and legislatures decide what the law is, or has been, and what it shall be. In theory Justice Thompson's precise assignment of power may be accurate; in practice it does not hold. Hence comes one of the great political controversies of the time. Its issues deserve the closest analysis.~~

Justice Story said: "The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws" <sup>1</sup>

Chancellor Kent said: "The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature" <sup>2</sup>

And Judge Cooley said: "Legislation is either introductory of new rules, or it is declaratory of existing rules. A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declares what it is and ever has been" <sup>3</sup>

Putting these three statements together, it is apparent that either courts or legislatures may declare what the law, common or written, has been or is; and by so declaring, establish what it shall be until changed by authority. The distribution of this power is what makes the trouble. Court and legislature each

<sup>1</sup> *Swift v Tyson*, 16 Pet 1 (1842)

<sup>2</sup> *Kent's Commentaries*, I, 471.

<sup>3</sup> *Constitutional Limitations*, 93.



has its champions. The friends of each begrudge the privileges of the other. Charges and counter-charges embitter the discussion. In recent years the assaults on the judiciary have been the more vigorous. Before the World War they led to programmes for what was styled the recall of judges or the recall of judicial decisions. Had not the War turned men's thoughts away from problems of social justice, there is no knowing what would before this have happened to the judiciary. The controversy revives and for many years will perplex

It will be seen that there are four processes concerned.

(1) The declaring by the *courts* of what has been and is the *common law* — by its application to litigated questions

(2) The declaring by the *legislatures* of what has been and is the *common law* — by declaratory statutes.

(3) The declaring by the *courts* of what has been and is the *written law* — by the interpretation of statutes

(4) The declaring by the *legislatures* of what has been and is the *written law* — by (respectively) explanatory or novel statutes.

(Remember that for the sake of convenience and simplicity we are here using the word "legislature" to include not only representative bodies, but also all other framers of statutes, ordinances, and the like, whether monarchs, the organs of aristocracies, or the people acting by mass vote.)

There appears no general disposition to take away from the courts the performance of the first of these four processes. At any rate there is no demand that the application of the law in specific cases be made again a function of legislatures. Critics of the proposed recall of judicial decisions have in the heat of partisan debate averred that such recall would result in a revival of this evil, that legislative bodies or the people at the ballot box would in moments of passion reverse in particular cases the application of law by the judges. The advocates of the programme stoutly deny that any such thing is contemplated, and in fairness its improbability nowadays should be admitted. When considering legislative justice we have seen that legislative bodies have been guilty of outrageous exercise of judicial power. That was in cases where such exercise of power was treated as legitimate. It is not probable that our written Constitutions will be changed so as to make it legitimate again. Let it be hoped we are too civilized to permit that.

There was a time when defeated litigants, complaining of judicial application of the common law, went to Parliament or some other legislative assembly and besought it to reverse the finding by statute. Sometimes a general law would be enacted and made retroactive for that purpose, sometimes a special law would be enacted to meet the particular case. Fortunately this is past as far as special laws are concerned. Constitutional provisions about *ex post facto* laws (those concerned with crimes, pains, and penalties), and laws impairing the obligation of contracts, together with judicial determinations in cases not covered thereby, would probably have put an end to the evil even if its general recognition as an evil had not made its continuance out of the question.

The second of our four processes, legislative declaration of the common law by declaratory statutes, goes beyond the matter of retroactive legislation, and invites discussion of whether or not it is better to frame codes than to rely on the common law. That question, however, interests lawyers more than legislators, and its discussion need not be attempted here.

The third process, the judicial interpretation of statutes, is more pertinent to the present inquiry, because it involves the possibility of deflecting or even subverting the will of the legislative branch, and to that extent making judges legislators.

Chief Justice M. P. Knowlton, of the Supreme Court of Massachusetts, in an address at the Yale Law School, June 24, 1901, well set forth the problem. A large and important part of judicial decision under our system, he said, is in the interpretation of statutes. Questions often arise in the application of statutory law to unforeseen circumstances, and a meaning must be given to language by construction, when the words as originally used meant something less in the minds of those who used them, because the new conditions were not then contemplated. Another class of questions arises under carelessly drawn statutes, where obscure or inconsistent provisions leave the meaning doubtful. It is obvious that in moulding new and imperfect and hastily drawn statutes into a system, the revisory work of the courts is hardly less important than the original constructive work of the legislatures. It is also manifest that in the construction of statutes, questions of great delicacy arise which involve the relations of the judicial and legislative departments to each other. Even in mere interpretation, when no constitu-

tional question is involved, the court must determine whether one purpose or another purpose should be imputed to the legislature, must try to ascertain the meaning of language in reference to conditions which were not thought of, must give weight to important principles that are a part of the very tissue of the State, and must reach a result, even when the best result possible will be of necessity unsatisfactory. Is it strange that there are decisions which are sometimes called judicial legislation?

Professor Gray has emphasized one feature of the task to which Judge Knowlton referred but casually. A fundamental misconception prevails, and pervades all the books as to the dealing of the courts with statutes, he says. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the legislature really was. But when a legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all, when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.<sup>1</sup>

The extent to which courts are nowadays called upon to enter this field of inquiry may be judged from the fact that in five volumes of Massachusetts Reports, Nos. 212 to 216 inclusive, statutory law was cited in 1018 instances.

Of course the judges lay the blame for this on the legislatures. They say that the statutes are drawn carelessly, loosely, in slovenly fashion. For instance, note this typical allegation by Judge Simeon E. Baldwin, in "The American Judiciary," p. 96: "A statute can be so drawn as to need no interpretation, or none the outcome of which can be a matter of doubt to any competent lawyer."

Although remembering the respect due to one who after teaching the law in the classroom and administering it from the bench, received the Governorship of his State as a token of the regard

<sup>1</sup> J. C. Gray, *The Nature and Sources of Law*, 165

and confidence of his neighbors, I cannot refrain from expressing the belief that this statement is utterly absurd. The greatest of American statutes is the Constitution of the United States. In a panegyric already become trite, Gladstone declared it the most wonderful work ever struck off at a given time by the brain of man. In its phrasing some of the most competent lawyers of that day took part. Yet hundreds of cases that have reached our highest courts show it needed interpretation in almost every line. The truth is that the writing of an absolutely clear law, the meaning and application of which will be apparent in every contingency, is one of the most difficult tasks that can confront the human intellect, and not infrequently is impossible of achievement.

What shall be said, however, of a statute enacted with the deliberate expectation that judicial interpretation will be necessary? Of this the most notable example is the Sherman Law. Senator George F. Hoar, its real author, was frank about it. Said he in his autobiography (II, 364) 'It was expected that the Court, in administering that law, would confine its operation to cases which are contrary to the policy of the law, treating the words 'agreements in restraint of trade,' as having a technical meaning, such as they are supposed to have in England. The Supreme Court of the United States went in this particular farther than was expected.... We thought it best to use this general phrase which, as we thought, had an accepted and well-known meaning in the English law, and then after it had been construed by the Court, and a body of decisions had grown up under the law, Congress would be able to make such further amendments as might be found by experience necessary."

Judge Baldwin (writing while an Associate Justice of the Supreme Court of Errors in Connecticut and Professor of Constitutional Law in Yale University) commented. "The Sherman Anti-Trust Act forbids contracts 'in restraint of trade or commerce' between the States. When the bill was reported it was objected in the House of Representatives that these terms were vague and uncertain. The chairman of the committee himself stated that just what contracts will be in restraint of such commerce would not and could not be known until the courts had construed and interpreted the phrase. The real intent of those who inserted it was that it should not embrace contracts which were reasonable and not contrary to public policy ... The addi-

tion by those who drafted the bill of three or four words to make their intended meaning clear would have avoided a result unexpected by them and probably undesired, and relieved the court from deciding questions of doubtful construction involving important political considerations and immense pecuniary interests." <sup>1</sup>

One is loath to believe that men like Senators Hoar and Edmunds, exceptionally able lawyers, with associates hardly behind them as lawyers and statesmen, would have failed to draft this law in simple, clear, unmistakable terms had it been as easy to do it as Judge Baldwin thinks. Yet on the whole the spirit of his criticism in this particular case will seem to many to have been warranted.

When the legislature by intentionally inadequate phrasing deliberately invites interpretation of a statute, clearly it asks the courts to share with it the lawmaking prerogative. There are those who think that when under any circumstances the courts interpret statutes, they legislate. For instance, Harrison S. Smalley argues thus: "If a legislature, having enacted a law, should become convinced that its meaning was not sufficiently clear or precise, and should therefore proceed to revise or expand certain of its provisions, would not such supplementary action be strictly legislative? Yet that is in substance exactly what the judiciary does when it construes a statute. Interpretation subsequent to the passage of an act is essentially amendment of it." <sup>2</sup>

The flaw in this argument may be in the use of the words "legislative" and "amendment." Although perhaps everything a legislature does is "legislative," yet the word usually implies novelty, newness, something more than reiteration, and likewise "amendment," although in parliamentary law including even any merely verbal change, whether altering the sense or not, yet in common usage implies essential change. If these implications prevail, then the judiciary may or may not legislate when it construes a statute. If it gives the statute the meaning the legislature really intended, it does not legislate; if it gives some other meaning, it does legislate. Unless we are ready to impugn the motives and processes of the court, unless we are willing to say that to a considerable degree our judges are dis-

<sup>1</sup> Simeon E. Baldwin, *The American Judiciary*, 97.

<sup>2</sup> "Nullifying the Law by Judicial Interpretation," *Atlantic Monthly*, April, 1911.

honorable men, a disgrace to their profession, then we must assume that they tell the truth when they say they really do try to find and declare the legislative will. There is nothing repugnant thereto in the fact that to this end they apply certain well-defined principles of long acceptance. For instance, take one as set forth by Chancellor Kent, a century ago, surely no innovation, no outgrowth of modern tendencies or usurpations: "Statutes are likewise to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. This has been the language of the courts, in every age, and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction." <sup>1</sup>

Would a contrary practice not be fraught with extreme danger? In case of doubt, would it not be folly to substitute the presumption that the legislature meant something contrary to the customs and habits and institutions of the people as mirrored by the common law?

Mr. Smalley says that in a large majority of cases judicial construction operates to restrict the application of statutes. "In fact the tendency in this direction is so strong that in many cases provisions of law are actually nullified by judicial interpretation — provisions, that is, which the courts uphold as perfectly valid and constitutional, but upon which they place so peculiar a construction as to deprive them of all their vitality. Thus many a law admirably designed for the alleviation of some distressing social or economic ill gives little, if any, of the relief desired."

If it be true that in a large majority of cases judicial construction so operates, it is because the courts naturally and properly and usefully assume that the legislature intends no innovation on the common law unless such intent is clearly shown. The burden of proof is always upon him who wants change. Otherwise society would be chaos. If a legislature means change, it should say so in language that cannot be misinterpreted.

C. G. Tiedeman goes even farther, for granting the convenience to the practical lawyer in accepting the fiction that the

<sup>1</sup> *Commentaries*, 1, 464.

judge does not make a law, that he simply declares what was the pre-existing law, Tiedeman avers that the critical student of political science repudiates it in the presence of "the undoubted formulation by the courts of principles, never before enunciated, and which in many cases conflict hopelessly with the fundamental principles of the past."<sup>1</sup>

Such criticisms as those of Mr. Smalley and Mr. Tiedeman assume that a court must have wrongly interpreted because its interpretation does not agree with that of the critics. They forget that every case in court has two sides, with opposing views. This is the essence of litigation. In theory, at least, we pick the best men we can find to say which side is right. Barring the exceptional, when we question their decisions "in a large majority of cases," or "in many cases," we imply that we did not in fact pick the wisest men for the work; and that there are wiser men, namely, ourselves; which savors of presumption.

Although it may seem to us that the criticism of the judges in this matter is extravagant, it does not follow that there is no evil to be remedied. Much is to be said for the clarification of statutes by some simpler, cheaper, quicker process than that of judicial interpretation through suits at law. Mr. Smalley makes to this end a suggestion worth at least consideration. He says, truly enough, that however excellent the legislative work may be, statutes will usually require more or less interpretation. This function he holds to be essentially legislative in character, and thence argues that it would be quite natural and proper to transfer it to the lawmaking authority, but inasmuch as legislative assemblies are not in session the greater part of the time, such a proceeding would obviously be out of the question. On the other hand it is conceivable that the interpretative function might advantageously pass to the executive department of the government. Indeed, an administrative body would seem to be a most desirable agency for the discharge of this important class of duties. Such an authority could proceed as soon as possible after the enactment of a law to make it the subject of study, and to interpret any passages which were found to be obscure. All persons would be allowed to present inquiries to this authority, with reference to the meaning of any statutory provision; and in case a question of construction not already settled should arise in the course of litigation, the court would at once refer it

<sup>1</sup> *The Unwritten Constitution of the United States*, 44.

to the same authority for decision. Of course, all rulings in the nature of interpretations would be made public, and printed copies would be sent free to all persons applying for them. Moreover all rulings would be regarded as part and parcel of the acts to which they applied, and hence would be final unless later amended by legislative action.

Under such a system it is probable that within a few weeks — at most a few months — after the passage of an act, all the more important points would have been suggested and settled. Thus would be saved the expense of litigation, and the tedious delay and uncertainty characteristic of the present system, the courts also would be saved the time they are now compelled to give to such matters, and would be spared the necessity of disclosing their ideas on current questions, while the public at large would be secured from the serious results that flow from judicial nullification of important statutes.

An authority, then, such as has been described, is highly to be desired, but how is it to be constituted? Several suggestions might be made, but the following two seem to Mr. Smalley to offer the greatest promise of success

So far as national legislation is concerned, Congress might confer on the heads of the administrative departments the power and duty of interpreting all acts pertaining to their respective departments, with final authority vested in the President, except that interstate commerce legislation would naturally be interpreted by the Interstate Commerce Commission rather than by a member of the Cabinet. Or else Congress might provide for a permanent Commission on Statutory Construction, which would devote itself exclusively to this work.

Such recourses, however, would surely run afoul of constitutional barriers against delegation of legislative power and usurpation of judicial prerogative. Recent grants of broad power to administrative agencies have so disclosed difficulties and dangers that remedies such as Mr. Smalley suggests are not now likely to be attempted.

Something should be said about the function of the courts in declaring what is not law. For if in one sense the judges make law, they also repeal it.

"No statute ever resisted, in the end, the unfavorable opinion of the profession. Whether he intends it or not, the judge's hand grows weak, the arm of justice loses its power, acute interpreta-



tion lends all its means to evade and undermine such a statute, to introduce conditions not found in the text or to contradict its language, and, as it were, by a silent conspiracy, to invent and recommend the most forced constructions, till even the rules of logic bend to the claims of interest. This silent war of the profession against the positive law is repeated wherever that law becomes out of date without being formally repealed. It is in this manner that our instincts of right naturally react against the legislator's disregard of them."<sup>1</sup>

When Lieber published his "Manual of Political Ethics," in 1838, he said there was to that day a law on the Statute Book of South Carolina, unrepealed by the authority which made it, to the effect that every male of age should go to church well armed. The dangerous state of the country at the time the law was enacted required it against the Indians. "Suppose," said Lieber, "a conscientious citizen were to appear in church with a brace of pistols, cutlass, and rifle. The whole community with one voice would set him down as deranged, he would lose all public confidence, and would most materially injure his family, besides disturbing public worship. Suppose, on the other hand, any public officer were to take it into his head to fine a citizen for not having appeared well armed in church, according to the old law. Would he not be scouted by judge, jury, people, by every one? And the law does stand repealed by the irresistible sense and sentiment of the community."<sup>2</sup>

The process goes on every day in every town and city of the land. Occasionally somebody remonstrates. A Law-Enforcement League will demand that the police and the courts enforce some law that has become a dead-letter. If the public approves, the law will be revived, if not, then juries will refuse to convict, and nothing is done about the matter. A thousand times it is said, "The best way to repeal a bad law is to enforce it." Those who repeat that, mean the enforcement of a bad law will incite the legislature to its repeal. As a matter of fact, however, the repeal usually comes by common connivance when the attempt to enforce is made.

Another phase of the subject is not to be overlooked. Laws that seem to have died, may be yet very much alive. One of John Winthrop's adversaries in the negative voice matter

<sup>1</sup> *Lieber's Hermeneutics*, Appendix by Dr. Hammond, 272, 273.

<sup>2</sup> *Manual of Political Ethics*, pt. 1, bk. 2, ch. 6.

averred that the Order of 1634 calling for a majority vote of both bodies, was obsolete, because, he said, it was never put in practice. Winthrop, writing in 1643, replied "I suppose the use of it being known (for it hath been oft spoken of in Court) hath kept proceedings in that good Order, that there hath been small or no occasion to make use of it" <sup>1</sup>

The topic has been the subject of learned discussion in times past. When the Roman law had reached its highest development, the Roman jurists recognized that law, whether of customary or of legislative origin, might be changed either by legislation or by custom. Even written law, they declared, might be superseded by a contrary custom, or disappear in consequence of non-use. "Enactments," Julian wrote, "are abrogated by desuetude" <sup>2</sup>. After the close of the Middle Ages it came to be denied that law could lose its force. Such doubtless would yet be the decision of artificial jurists, but the everyday practice of mankind rejects then sophistries and society applies only those rules that at the moment have some measure of common approval. Custom is a slow, ponderous engine, but it moves, and in time crushes everything in its path.

In this matter the courts respond to the popular will more quickly than the legislatures. It is rare that a legislature repeals a law because it is obsolete. Even when the periodical revisions of the statutes are made, it is customary to forbid the revisers to omit anything, and the legislatures that ratify the revisions look to it that nothing has been dropped.

Furthermore, statutes are rigid, necessarily. Gross would be the injustice, enormous the hardship, if there were no courts to soften their application.

It is often urged that no law should be put on the statute-book when not meant to be precisely, constantly, and universally enforced. This overlooks the fact that a law may serve a useful purpose simply as a declaration, a formulation, of the popular will. There are customs (and customs are the popular will) which cannot be defined in words that will have universal bearing. The limitations of language may compel phraseology that must be interpreted and applied with the exercise of what we call judgment, or common sense — both of them meaning the general belief as to what is right under the circumstances. Laws

<sup>1</sup> *Life and Letters of John Winthrop*, II, 435

<sup>2</sup> Munroe Smith, "Customary Law," *Political Science Quarterly*, June, 1903

of this class presume discretion on the part of the administrator, and tacitly give him latitude. Of course it would be far better if this were not necessary, if the printed words could always and everywhere bring the same results. The relations of life prove at every turn the impossibility of this. But because an adequate and accurate rule is often impossible, should there be no rule? Everyday experience gives the answer. The spirit of the rule is commonly understood and in essence obeyed. It follows that it may be wise to formulate the rule as best we can, in order that its declaration in the shape of law may attest to its existence.

Discretion in the enforcement of law is an idea sure to arouse the wrath of the intolerant. Yet it is at times both necessary and wise. A striking proof of this may be found in the Sunday laws. Nobody observes them to the letter nowadays and they are nowhere literally and invariably enforced. Nevertheless they are of great value to the peace and comfort of the community, for they are at hand to be used when needed. For instance, in few places would there be interference with two men playing tennis on Sunday out of sight from the road, behind some country house. Should the same men try to play under the windows of a church, they would be instantly arrested. So here as everywhere custom — call it prejudice if you prefer, common instinct, common sense, if you please — but anyway custom, will in the end dominate.

#### THE LAW OF NATURE

Changes in the common law to apply in the future fall more properly into the fourth class of processes we are considering, being covered by that part of it concerned with novel legislation. Here judicial action has no bearing, except so far as the courts yet apply the doctrine of Natural Right and upset statutes because they are believed to conflict with some of the inalienable perquisites of manhood. This we are now to discuss.

The Deity has not been restricted by the human imagination to specific precepts in the nature of the Ten Commandments. There is no limit to the scope speculation has given to what some call the Divine Law, and others, meaning the same thing, the Law of Nature.

"As man depends upon his Maker for every thing, it is necessary that he should, in all points, conform to his Maker's will. This will of his Maker is called the law of nature. For as God,

when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endowed him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws "

Thus wrote Sir William Blackstone in his Commentaries, and Mackintosh in his note added. "The 'Law of Nature' is a supreme, invariable, and uncontrollable rule of conduct to all men, and it is so called because its general precepts are essentially adapted to promote the happiness of man, as long as he remains a being of the same nature with which he is at present endowed, or, in other words, as long as he continues to be man, in all the variety of times, places, and circumstances in which he has been known, or can be imagined to exist "

This was the doctrine that dominated the political thought of the civilized world until about a century ago. The Greeks were the first to give it study.<sup>1</sup> Herachus, who taught about 460 B.C., may have been the earliest to catch a glimmer of the notion. The Cyrenaican School argued against him. Then the Sophists, who shone at the most enlightened period of Greek history, came to the support of the theory. Plato in the Republic developed it, contending for a natural justice of more than human origin that is reflected but imperfectly by the justice of man. The Stoics rounded out the logic, conceiving God as universal reason, ruling the world by universal law, to which every creature is subject.

It was the Stoic conception that Rome borrowed, incorporating it into Roman law. Her philosophic jurists declared the true and fundamental law was in the mind of Deity himself when He created the universe. Cicero was the most eminent expositor of the doctrine, notably declaring it in his treatises "De Legibus" and "De Republica." In the Middle Ages Thomas Aquinas was its prominent champion. He maintained that no government can command what is contrary to Natural Law without becoming tyrannical. Melancthon, Luther's ally, helped to keep the conception alive. Spinoza and Pufendorf on the Continent, Locke in England, continued the development of the idea. Locke

<sup>1</sup> George L. Scherger, *The Evolution of Modern Liberty*, *passim*  
W. W. Willoughby, *The Nature of the State*, *passim*

declared the powers of legislators always limited by one principle: "The rules that they make for other men's actions must, as well as their own and other men's actions, be conformable to the law of nature, i e , to the will of God" Rousseau in the "Social Compact" averred that the existing situation is but a degeneration from a more perfect order, when man, born free, was possessed of natural liberty and governed by natural law; and that this degeneration had begun when man exchanged natural liberty for civil liberty, and natural law for positive law.

At the time, then, when the American colonies began to find their yoke galling, practically all the writers on political science and all the eminent lawyers were agreed that the law of Nature or law of God, was the supreme law and that it overruled all human laws inconsistent therewith. Since the first practical application of this theory on a great scale was of vital consequence to the destinies of the American people, since more than anything else it contributed to the creation of the United States of America, and since it survives in its influence on the law-making controversies of today, let us examine the legal phases of the American Revolution with some care.

For this purpose it will not be necessary to ransack the history of all the colonies. Massachusetts took the lead and her contentions were typical enough of American argument as a whole to suffice for illustration. Most of the quotations I shall give are from the little volume known as "Massachusetts State Papers," and need not be separately credited.

It will of course be remembered that the controversy came to a head over the attempt of the mother country to make the colonies help pay the cost of the home government. Locke had said that the supreme power cannot take from any man any part of his property without his own consent, which he defined as "the consent of the majority, giving it either by themselves or by representatives chosen by them."<sup>1</sup> A Massachusetts Act of 1692 had declared no tax should be laid "but by the Governor, Council and Representatives of the people, assembled in General Court." It does not, however, necessarily follow that therein the controlling and paramount authority of King or Parliament was meant to be denied. As a matter of fact, seventy years and more were to pass before the colonists would carry their logic to its conclusion. When taxation then became a burning issue, they

<sup>1</sup> *Two Treatises of Government*, ch. xi

did not at first deny that acts of Parliament were above charters and might clarify them. This they admitted to be true, in a letter sent by the General Court to Mauduit, the agent of the province, November 3, 1764, accompanying a petition to the House of Commons. Indeed they went farther and admitted that an act of Parliament might infringe upon a charter. Writing to them early in the following year, Mauduit reported that such was the position taken by the home government. "I plainly saw, some time ago," he said, "that right, founded in charter or customs, could not be supported by any one in the House, against the right of Parliament to tax the colonies."

This drove the colonists to turn for protection to a higher right than that of charters or customs. They set it forth in the succinct and consecutive statement of their constitutional position in "Resolutions of the House of Representatives, expressive of their sense of the rights of the colonies, October 25, 1765," the substance of the argument appearing in the following.

"1 *Resolved*, That there are certain essential rights of the British constitution of government, which are founded in the law of God and nature, and are the common rights of mankind, Therefore,

"2 *Resolved*, That the inhabitants of this province are unalienably entitled to those essential rights, in common with all men, and that no law of society can, consistent with the law of God and nature, divest them of those rights.

"3 *Resolved*, That no man can justly take the property of another, without his consent, and that upon this original principle, the right of representation in the same body which exercises the power of making laws for levying taxes, which is one of the main pillars of the British constitution, is evidently founded . .

"10 *Resolved*, That the inhabitants of this province are not, and never have been, represented in the Parliament of Great Britain, and that such a representation there, as the subjects in Britain do actually and rightfully enjoy, is impracticable for the subjects in America. And further, that in the opinion of this House, the several subordinate powers of legislation in America, were constituted upon the apprehensions of this impracticability."

Observe the wording of these resolutions. The first and second implied that there is a class of rights beyond the reach of legislative power, but did not deny Parliament the control over other

rights. Pitt admitted that Parliament could bind the colonists "in all cases whatsoever," except only in matters of taxation. That was the American view at the start of the litigation, which accounts for the phrasing of the third resolution, confining the issue to laws for the levying of taxes. Bringing in the factor of representation, it made property a hybrid right, a contingent supreme natural right, so to speak, which was somewhat paradoxical. It escaped the problem of whether the minority has any rights the majority is bound to respect, the live issue nowadays.

The tenth resolution raised the question that was chiefly to be discussed and that furnished the slogan which was to capture the imagination of the masses, bring them to fighting mood, and ever since to furnish writers of school histories with a compact reason for the American Revolution. Yet after the lapse of a century and a half, perhaps it will not be deemed disloyal to point out that seldom in this discussion was the question of representation squarely faced. We have seen that every member of the British Parliament was in theory supposed to represent every human being in the whole empire — not the constituency that elected him.<sup>1</sup> We have also seen that generally in the colonies, and notably in Massachusetts, representatives represented their districts, usually the towns that elected them and in which they lived.<sup>2</sup> From the English point of view, the argument of the Americans that they were not represented might well have been held untenable in theory. The only safe course for the colonists, logically speaking, was to take it for granted that the American view of representation was alone to be considered. Ever since that time it has been the practice of Americans to assume that the colonies justifiably went to war because of "taxation without representation." No true American today regrets that war, or rather, regrets what it brought, but it is by no means clear that the colonies were not, or could not be, represented in the Parliament of England.

In January of 1768, on the 12th, the House of Representatives found occasion to reiterate its views of natural right, saying in a letter to De Berdt, who had become the London Agent of the colony: "It is an essential, natural right, that a man shall quietly enjoy, and have the sole disposal of his own property. This right

<sup>1</sup> Robert Luce, *Legislative Principles*, 435-39

<sup>2</sup> *Ibid.*, 336 *et seq.*

is adopted into the constitution" On the 20th of the same month the House addressed a petition to the King, in which it said the superintending authority of Parliament was clearly admitted in all cases that could consist with the fundamental rights of nature and the constitution

In Governor Hutchinson, a skillful, adroit, and learned lawyer, the logicians of the General Court found a foeman worthy of their steel. Stoutly and consistently he fought for the supreme authority of Parliament. For instance, on the 14th of July, 1772, he told the legislators: "It is a part of the prerogative of the Crown, as well as of the power and authority of Parliament, to constitute corporations or political bodies, and to grant such bodies a form of government, and powers of making and carrying into execution such laws, as from their local, or other circumstances, may be necessary, *the Supreme Legislative authority of the British dominions always remaining entire, notwithstanding*" Six months later, in his speech to the two Houses (January 6, 1773), he restated his position with a thorough argument for the supreme authority of Parliament.

The colonial lawyers were beginning to see the need of clarifying their position as to natural rights. So in its answer the House drew a distinction between *supreme* and *unlimited* authority, arguing that the *supreme* authority of every government is limited, and proceeding to specify at length the limitations put on Parliament by Magna Charta and various statutes declaratory of the liberties of the subject. "Life, liberty, property, and the disposal of that property, with our own consent, are natural rights."

Hutchinson made an able reply in his speech to both Houses February 16, 1773, in the course of which he said: "That the common law should be controlled and changed by statutes, every day's experience teaches, but that the common law prescribes limits to the extent of the legislative power, I believe has never been said upon any other occasion." To this the Council retorted: "What is usually denominated the supreme authority of a nation, must nevertheless be limited in its acts to the objects that are properly or constitutionally cognizable by it."

Observe the words — "properly or constitutionally." If taken in the alternative, they meant that either (1) a law higher than the Constitution or (2) the Constitution itself limited the supreme authority of a nation. In effect this went to the point



of declaring that in spite of Hutchinson's view, the common law, the natural law, did prescribe limits to the extent of the legislative power. Such a limit was transgressed when a charter was infringed.

Of that the lawyers had by this time convinced the people. In the course of the summer, county convention after county convention took up the theme, hammering away with the argument they thought incontestable. Berkshire, July 6, held "that whenever any franchises and liberties are granted to a corporation or body politic, those franchises and liberties cannot legally be taken from such corporations and bodies politic, but by their consent or by forfeiture." Middlesex, August 30-31, resolved "that when our ancestors emigrated from Great Britain, charters and solemn stipulations expressed the conditions and what particular rights they yielded, what each party had to do and perform." The province had not transgressed the charter provisions, Parliament had. So it was further "*Resolved*, That a debtor may as justly refuse to pay his debts, because it is expedient for him, as the Parliament of Great Britain deprive us of our charter privileges, because it is inexpedient to a corrupt administration for us to enjoy them."

Suffolk, September 6, declared the late acts of Parliament "gross infractions of those rights, to which we are justly entitled by the laws of nature, the British constitution, and the charter of the province," and that no obedience was due to them. Hampshire, on the 22nd and 23rd, was even more specific: "The charter of this province is a most solemn stipulation and compact between the King and the inhabitants thereof. It ought to be kept sacred and inviolate by each party, and it cannot be varied or altered by one party only, without a most criminal breach of faith." Plymouth, September 27, unanimously voted "that the interposition of any other power on earth in our affairs... in other manner than is expressed and provided for in the original compact, is an infraction of our natural and constitutional rights."

Such was the reasoning that led to the American Revolution, the Declaration of Independence, and the founding of a great nation, its very corner-stone being the doctrine of Natural Law.

It was indeed a "lawyer's revolution," being the application of what was then held as an established legal principle, to a state of facts. On the field of battle the case was won.

## NATURAL RIGHTS AND THE COURTS

The binding force of the Law of Nature had always been recognized in Massachusetts. As early as 1657 it was the basis of a judicial decision. A town had voted its minister a dwelling and suit was begun to compel the payment of a tax levied for the purpose. Magistrate Symonds held the vote void. "A fundamental law is such a law as that which God and nature have given to a people." The right of property is a fundamental right under that law. In this case a man's goods were without his consent to be given to another man, which is against the fundamental law.<sup>1</sup>

James Otis, the most brilliant of the lawyers who argued the colonies into rebellion, knew and used the highest judicial authority for the support of his position. It was no other than Lord Chief Justice Coke upon whom he mainly relied. In *Bonham's Case*, 7 Jas I, 1609, which arose upon the fining and imprisonment of the plaintiff by the censors of the College of Physicians, under color of a patent of Henry VIII and the Statutes of 14 II 8 and 1 M. as to practising physic without their allowance, Lord Coke decided against the statute because it gave both judicial and ministerial functions to the College. His language (8 Coke 118a) is worth remembering. "And it appears in our books that, in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void, for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

Lord Chief Justice Hobart, also, had advanced that "even an act of Parliament made against natural equity, as to make a man judge in his own cause, is void in itself, for *jura naturae sunt immutabilia*, and they are *leges legum*."<sup>2</sup>

In *City of London v Wood*, 12 Modern, 687, Lord Chief Justice Holt observed: "What my Lord Coke says in *Dr Bonham's case*, in his 8 Co is far from any extravagancy, for it is a very reasonable and true saying, That if an act of Parliament should ordain that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void act of Parliament, for it is impossible that one should be

<sup>1</sup> *Giddings v Browne, Hutchinson Papers*, II, 1

<sup>2</sup> *Day v Savadge, Hobart*, 57

judge and party, for the judge is to determine between party and party, or between the government and the party:... but it cannot make one that lives under a government judge and party. An act of Parliament may not make adultery lawful. . ."

In the famous case of Monopolies (11 Co , 84, 86a-87b), Chief Justice Popham and his associates held that a grant of the exclusive right to manufacture playing cards within the realm was void as against the common law. Such a grant, although it was made by the crown, was in its essence only an act of legislation.

On this authority Bacon's Abridgment, first published in 1735, said: "If a statute be against common right or reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void. It has been holden, that a statute contrary to natural equity, as to make a man judge in his own cause, is void." Viner's Abridgment (1741-51), from which Otis quoted, said much the same thing, and so did Comyn's Digest, published 1762-67, but written more than twenty years before.

Whether by reason of the evident danger of the principle as brought into sharp prominence by its application in support of the colonial view, or from some other cause, it was destined not to survive in England. Instead, the omnipotence of Parliament was more and more urged until it came to be the accepted theory. Even while James Otis was making the walls of the old State House in Boston ring with his eloquence, Sir William Blackstone was giving to the world his epoch-making Commentaries, in which he exhausted language to describe the extent of the powers of Parliament. First he quoted Sir Edward Coke (4 Inst 36). "The power and jurisdiction of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court it may be truly said '*Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima, si jurisdictionem, est capacissima*'"

Blackstone went on to say. "It hath sovereign and uncontrolled authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution

of these kingdoms All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the crown, as was done in the reign of Henry VIII and William III. It can alter the established religion of the land, as was done in a variety of instances, in the reign of Henry VIII and his three children It can change and create afresh even the constitution of the kingdom and of Parliaments themselves, as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible, and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament ”<sup>1</sup>

A few years later De Lolme put it more tersely “It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man and a man a woman.”

Nevertheless Blackstone had also declared, “This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other It is binding over all the globe, in all countries, and at all times, no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately and immediately, from this original.”<sup>2</sup> The inconsistency had become recognized by the time Christian published his edition of the great Commentaries, and the change of view had ripened enough for him to say in a footnote “With deference to these authorities, I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature His province is to interpret and obey the mandate of the supreme power of the State. And if an act of Parliament, if we could suppose such a case, should, like the edict of Herod, command all the children under a certain age to be slain, the judge ought to resign his office rather than be auxiliary to its execution, but it could be declared void only by the high authority by which it was ordained ”

After the American Revolution, the English Privy Council and Court of King’s Bench, without expressly overruling the decisions of Lord Coke, Lord Hobart, and Lord Holt that an act of Parliament contrary to natural equity or the rights of Englishmen was void, upon which the legal justification of the successful

<sup>1</sup> *Commentaries*, I, 160

<sup>2</sup> *Ibid*, I, 41

American Revolution was founded, made a series of decisions establishing the omnipotence of Parliament. They held that Parliament was not merely the supreme legislature for the kingdom of Great Britain, but its highest court as well, under the name of the High Court of Parliament. Now for the last hundred years it has been maintained that the acts of the High Court of Parliament, whether legislative or judicial, can no more be questioned by an inferior British court than the decisions of a court of last resort within its jurisdiction can be questioned by a justice of the peace.<sup>1</sup>

Quite different has been the career of the doctrine on this side of the water. The colonists who based their revolt on the ground of Natural Right, were not likely to forget it when they came to frame their Constitutions. Samuel Adams had said in the report on the Natural Rights of the Colonies, made to the Committee of Correspondence by Adams, Warren, and Church at Faneuil Hall, November 20, 1772 "Every natural right not expressly given up, or, from the nature of a social compact, necessarily ceded, remains." Having risked their property, their homes, their lives in support of this belief, it is no wonder that they placed it in the forefront of the frames of government they were now to devise. Here is the explanation of the emphasis they put on Bills of Rights, the care with which these Bills were drafted for the various State Constitutions, and the insistence upon amendments to the Federal Constitution that should set forth the unalienable perquisites of manhood. "By this they meant to set limits to every form of governmental power which might ever tend to invade these rights. Thus, for the first time in the history of the world, life, liberty, and property were intended to be placed under the protection of a law so inclusive that it would in the future bind all executives, all legislatures, and all courts."<sup>2</sup>

Of course so vital a proposition was sure to get into the courts. From some of the more important declarations of the judges and

<sup>1</sup> *Kielley v. Carson*, 4 Moore Privy Council, 89-90

*Burdett v. Abbot*, 14 East, 135, 138, 141, 159-60

*Stockdale v. Hansard*, 9 Adol. & Lills, 109, 127, 130

*Kilbourn v. Thompson*, 103 U.S., 183-85

Report of Committee on Duty of Courts to Refuse to Execute Statutes in Contravention of the Fundamental Law, to New York State Bar Association, January, 1915

<sup>2</sup> David Jayne Hill, "Taking Soundings," *North American Review*, May, 1914.

from some of the great text writers we can learn how the conflict of opinion has developed with us

In New York the war that had been fought for Natural Right was hardly over when the question was raised in the famous case of *Rutger v Waddington*, decided in 1784 After hearing a very able argument by Alexander Hamilton, the Mayor's Court of New York held unconstitutional and void the Trespass Act, which authorized actions by owners against those who had occupied their houses under British orders during the British occupation Hamilton argued that the law violated natural rights, and the decision seems to have been placed upon this ground The Assembly, jealous of its prerogatives like all Assemblies, resolved that this "would render legislatures useless" A mass meeting of indignant citizens began the long record of attack upon the judiciary by declaring that such power in the courts "would be most pernicious"

Eight years later, in a South Carolina case, *Bowman v Middleton*, 1 Bay, 252, it was held that where two grants had in part covered the same land, an act of the Assembly passed in 1712, transferring a freehold from the heir-at-law of one grantee and confirming it in a son of the other, without a trial by jury, was null and void "as it was against common right, as well as against *magna charta*, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question"

The Justices of the Supreme Court of the United States were to have an early chance to voice their views on this all-important issue In the case of *Calder v. Bull*, 3 Dallas, 386, decided in 1798, two of them presented the opposing views with sharp contrast Justice Iredell's mind followed the channel by this time habitual in England "If," he said, "a government, composed of legislative, executive, and judicial departments, were established by a Constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void, but I cannot think, that under such a government any court of justice would possess a power to declare it so"

Justice Chase held to the American doctrine. "I cannot subscribe," he said, "to the omnipotence of a State Legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the Constitution, or fundamental law of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact, and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it ... An Act of the Legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."

John Marshall, foremost of our great jurists, found occasion to place himself on the question soon after he came to the bench. It was not necessary for the decision of *Fletcher v. Peck*, 6 Cranch, 87 (1810), that he should answer it, yet he thought fit to observe: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection."

Next came Chancellor Kent. It is notable that intense conservative though he was, Federalist like Marshall, and believer in the authority of government, he, too, then recognized a law higher than that of Legislatures or Conventions. It was in 1816 that he pronounced himself, in the case of *Gardner v. the Village of Newburgh*, Johnson's Chancery Reports, N. Y. 2, 162. The New York Legislature had authorized the village to supply itself with water from a stream, but had made no provision for indemnifying the owners of lands through which the stream flowed, for the injury they must suffer from the diversion of the water. The Constitution of New York at that time contained no provision prohibiting the taking of private property for

public use without compensation; notwithstanding this, the Chancellor restrained the village from proceeding. He supported his decision upon the broad general principle he found in Magna Charta, and in Grotius, Pufendorf, and Bynkershoek. He referred also to a like provision in the Constitution of the United States, which, however, although expressive of the sentiment of the nation, was intended to apply only to the Federal Government.

When the Chancellor came to publish the first volume of his celebrated Commentaries, ten years later, he must have forgotten this, or perhaps he had come to realize where such logic led. Anyhow he reversed his position, for now he said (I, 448): "The will of the Legislature is the supreme law of the land, and demands perfect obedience." Admitting this conclusion of English law, he nevertheless went on to admire the intrepidity and powerful sense of justice which led Lord Coke to declare that the common law controlled acts of Parliament, and adjudged them void, when against common right and reason.

Kent's later view for a time seemed likely to prevail here as it had prevailed in England. For instance, we find Justice Rogers saying in Pennsylvania, in 1830 "If the Legislature should pass a law in plain, and explicit terms, unequivocal, within the general scope of their constitutional power, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice, for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or at least, not in harmony with the structure of our ideas of natural government."<sup>1</sup>

It will be noticed that emphasis began to be placed on the importance of a clear expression of the legislative will. In that direction were the courts to seek the loophole for escape from the strict obligation of the theory of legislative omnipotence. For instance, note the language of a Texas court "In case of a peaceful change of government by the people assembled in convention, . . . it would be in the power of such convention to take away or destroy individual rights, but such an intention would never be presumed, and to give effect to a design so unjust and

<sup>1</sup> *Commonwealth v. McCloskey*, 2 Rawle, 369 (1830)



unreasonable would require the support of the most direct, explicit affirmative declaration of such intent " <sup>1</sup>

It is curious to observe that by 1855 the doctrine of Natural Rights had apparently become so nearly obsolete that such a careful jurist as Chief Justice Redfield of Vermont could in effect say it had never existed. There is ground for wonder whether he spoke in ignorance of the views of Chase and Marshall, and overlooked Kent's early decision, when he said. "It has never been questioned, as far as I know, that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We cannot well comprehend how, upon principle, it could be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State Legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular State in question " <sup>2</sup>

The very next year Justice Selden of New York gave the doctrine even less mercy, although admitting more authority for it. "To determine," said he, "the extent of the lawmaking power, we have only to look to the provisions of the Constitution. It has, and can have, no other limit than such as is there prescribed; and the doctrine that there exists in the judiciary some vague, loose, and undefined power to annul a law, because in its judgment it is 'contrary to natural equity and justice,' is in conflict with the first principles of government, and can never, I think, be maintained. I am aware that some eminent judges, when the question was not before them, have expressed a belief in the existence of such a power, but no court has ever, I believe, assumed to declare an explicit enactment of the Legislature void on that ground." <sup>3</sup>

When Judge Cooley published his "Constitutional Limitations," in 1868, he took the same view (p. 73). "A statute cannot be declared void because in the opinion of the court, it violates fundamental rights or principles, if it was passed in the exercise

<sup>1</sup> McMullen v Hodge, 5 Texas R. 73, Lapscomb, J. (1849)

<sup>2</sup> Thorpe v R & B R Company, 27 Vt. 142, Redfield, C. J. (1855).

<sup>3</sup> Wynehamer v The People, 13 N. Y. 430 (1856)

of a power which the Constitution confers Still less will the injustice of a constitutional provision authorize the courts to disregard it, or indirectly to annul it by construing it away. It is quite possible that the people may, under the influence of temporary prejudice, or mistaken view of public policy, incorporate provisions in their charter of government, infringing upon the right of the individual man, or upon principles which ought to be regarded as sacred and fundamental in republican government, and quite probable that obnoxious classes will be unjustly disfranchised. The remedy for such injustice must rest with the people themselves, through an amendment of their work when better counsels prevail "

The tide, however, had begun to turn An inkling of what was to come appeared in 1867 in Judge Jameson's authoritative work on "The Constitutional Convention " "All measures," said he (p 347), "relating to the conduct or to the rights of individuals, to the administration, or defence of the government, which are not prohibited by the fundamental law or by the moral code, and which yet are deemed, on a large view of the public interests, to be expedient, are within the competence of a legislature with the general powers of legislation conferred by our Constitutions " And farther on (p. 365) "A legislature is competent to provide by law for all exigencies requiring provisions of a legislative nature, so far as it is not restrained by the rules of morality, or by express constitutional inhibitions "

In 1874 came the definite return to the position of a century before It was in the case of *Loan Association v. Topeka*, 20 Wall 655, one of the cases decided by the Supreme Court of the United States that are landmarks in the history of our jurisprudence The full court, only one member dissenting, held to be void a State law authorizing cities to issue bonds in aid of private manufacturing enterprises Such bonds could be paid only by taxation, and to tax for such a purpose would be taking property from all for the good of some. That, said Mr Justice Miller in delivering the opinion, is none the less a robbery because it is done under the forms of law and is called taxation "This is not legislation It is a decree under legislative form "

The Justice went on to say "It must be conceded that there are some rights in every free government beyond the control of the State A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject

at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority if you choose to call it so, but it is none the less a despotism. It may well be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to his happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and national, is opposed to the deposit of unlimited powers anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which flow out of the essential nature of all free governments. [There are] implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

As to the application of the doctrine of Natural Rights in this particular case, it may be commented that practically all legislation helps some members of society and hurts others. Such is the very essence of legislation. It disturbs status. The theory is that the disturbance will end in a gain for society. In theory there is nothing worse in taxing the property owners of the city for the aid of an industry expected to increase the common prosperity, than there is in a tariff duty meant to encourage the manufacture of tin-plate or dyes, or in a tax relieving citizens who are parents from the cost of educating their children, or in a law compelling house owners to use fire-proof shingles or to connect their houses with a public sewer. In the last analysis nearly every law transfers something from A to B. It matters not whether this advantage be tangible or fancied, large or small. Somebody gains, somebody loses, for you cannot create something out of nothing, you cannot create an advantage out of a vacuum. This makes the whole question one of degree, and there is no principle, no fundamental right, in a matter of degree.

Let it not be thought that the end has been reached in the long debate as to whether Natural Right or Legislative Law is supreme. As late as 1906 a Kansas court declared: "The Legislature represents the people of the State, and there are no limits upon the power which that body may exercise, except such as may be found in the Constitution itself, or in the Federal Con-

stitution" <sup>1</sup> This was in line with the decisions that led Judge Simeon E. Baldwin, in his book on "The American Judiciary," though recalling what Coke and Marshall and Miller had said in support of the theory that the judiciary can disregard a statute plainly violating the fundamental principles of natural justice, nevertheless to aver that "the weight of American authority is in favor of the position taken by Iredell."

On the other hand, note the latest relevant decision at this writing of the United States Supreme Court, in the *Gold Cases*, February 18, 1935. Two questions were in issue. Could Congress destroy provisions in private contracts calling for payments in gold? Could Congress repudiate contracts of the Government to make payments in gold? The answer to the second question is what concerns us here. The Constitution forbade the States to pass any law impairing the obligation of contracts, but did not specifically prohibit Congress from doing this. Had it the right? All the judges denied it, with language varying because four out of the nine, dissenting in the matter of private contracts, put into one opinion their views of both kinds, and one wrote a dissent upon another phase of the matter.

Both majority and minority quoted with approval the words of Alexander Hamilton in a communication to the Senate January 20, 1795: "When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of moral agent, with the same rights and obligations as an individual. Its promises may justly be considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it" <sup>2</sup>

Both also quoted Chief Justice Waite, speaking for the majority in the *Sinking Fund Cases*, 99 U. S. 700, 719 (1878): "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." Chief Justice Hughes, speaking for the majority, phrased it thus. "When the United States, with constitutional

<sup>1</sup> *Ratchiff v. Stock-yards Co.*, 74 Kas. 1.

<sup>2</sup> Alexander Hamilton, *Works*, III, 518, 519.

authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments" And farther on "While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign"

Here the layman will have difficulty How something can bind upon the conscience and yet impose no duty, is for the casuists to explain. However, we are here concerned, not with what Congress ought to do, but with what it had the power to do, supposing natural right, the moral law, to be dominant Here the characterizations by the Court are of interest The Chief Justice brought in the moral issue only by quoting "wrong and reproach" from the *Sinking Fund Cases* Justice Stone, calling the action of the Government "a repudiation," began the next sentence with. "As much as I deplore this refusal to fulfill the solemn promise of bonds of the United States," etc It remained for the minority to be explicit Speaking for it, Justice McReynolds said: "Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence, but we are asked to affirm that the Constitution has granted power to accomplish both. No definite delegation of such a power exists, and we cannot believe the far-seeing framers, who labored with hope of establishing justice and securing the blessings of liberty, intended that the expected government should have authority to annihilate its own obligations and destroy the very rights which they were endeavoring to protect Not only is there no permission for such action, they are inhibited And no plenitude of words can conform them to our charter"

In the course of oral statement from the bench the Justice is reported to have said "To us (the minority) the record reveals a clear purpose to bring about confiscation of private rights and the repudiation of national obligations It is almost impossible to overestimate the result of what has been done here this day. The Constitution as many of us have understood it, the Constitution that has meant so much to us, has gone . . . The powers of Congress have been enlarged to such an extent no man can foresee their limitations, and we stand as a people to-day stripped of the very fundamental guarantees which we have heretofore supposed stood between us and arbitrary action .. We protest That never was the law. It never ought to be the

law, and the shame and humiliation of it all no one of us can foresee." <sup>1</sup>

Legalism aside, it must be recognized that there is earnest, serious difference of opinion as to merits. No insignificant number of those who concern themselves with the science of government, hold that society has its natural rights as well as the individual, that where they conflict, those of society should prevail; and that for determining and applying them the legislative branch is a safer and wiser organ than the judicial. If it be true that fundamental rights are not determined by any divine law or by human nature in the abstract, but by the customs and ideals of a given age and people, then it may be that those rights when affecting written law should be defined and from time to time re-defined by the men chosen to declare what the law shall be rather than by those whose chief concern is to say what the law has been, and where necessary be set forth in the Constitution by the people acting through one of the methods for amending that instrument.

#### BINDING THE FUTURE

Hitherto the doctrine of Natural Rights has implied there are certain rights that never change — the same yesterday, to-day, and forever. There is grave doubt if this be true. It would be hard to name a right that at some other time or place has not been held a wrong. If there is any Law of Nature, it is the law of change. So the biologists have proved. Long before they taught us of evolution, the experts in the science of government accepted its lesson in one important particular, maybe unwittingly, but if so in response to an instinct of the truth. They forbade a lawmaking body to try to bind a successor. Blackstone recalled that Cicero, in his letters to Atticus, treated with a proper contempt those restraining clauses which endeavor to tie up the hands of succeeding legislatures. "When you repeal the law itself," said Cicero, "you at the same time repeal the prohibitory clause which guards against such repeal." And Blackstone went on to say (p. 90): "Acts of Parliament derogatory to the power of subsequent Parliaments, bind not.... Because the legislature, being in truth the sovereign power, is always of equal, and always of absolute authority, it acknowledges

<sup>1</sup> *Congressional Record*, 71th Congress, 1st session, p. 2974, February 28, 1935. Copied from *Wall Street Journal*, February 23, 1935.

no superior upon earth, which the prior legislature must have been if its ordinances could bind a subsequent Parliament."

Thomas Paine set forth the doctrine with his usual vigor: "There never did, there never will, and there never can exist a parliament of any description of men, in any country, possessed of the right or the power of binding and controlling posterity to the '*end of time*,' or of commanding forever how the world shall be governed, or who shall govern it.... Every age and generation must be as free to act for itself, *in all cases*, as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies ... Every generation is and must be competent to all the purposes which its occasions require. It is the living, and not the dead, that are to be accommodated. When man ceases to be, his power and his wants cease with him, and having no longer any participation in the concerns of this world, he has no longer any authority in directing who shall be its governors, or how its government shall be organized, or how administered." <sup>1</sup>

One of our courts, in the case of *Bloomer v Stolley*, 5 McLean, 161 (U.S. Circuit Court — 1850), has amplified the reasons: "Unlike the decision of a court, a legislative act does not bind a subsequent legislature. Each body possesses the same power, and has a right to exercise the same discretion. Measures, though often rejected, may receive legislative sanction. There is no mode by which a legislative act can be made irrevocable, except it assume the form and substance of a contract. If in any line of legislation, a permanent character could be given to acts, the most injurious consequences would result to the country. Its policy would become fixed and unchangeable on great national interests, which might retard, if not destroy, the public prosperity. Every legislative body, unless restricted by the Constitution, may modify or abolish the acts of its predecessors; whether it would be wise to do so is a matter for legislative discretion."

The Constitution of the United States contemplated an important invasion of this doctrine in its provision forbidding the States from passing any law impairing the obligation of contracts. The bearing of this was quickly emphasized by some of the most important cases that have ever come before our Su-

<sup>1</sup> *Writings*, Conway ed., II, 277, 278.

preme Court Although it is the Dartmouth College case that stands in common opinion as the landmark establishing that a grant, whether public or private, is an executed contract, not to be impaired by subsequent legislation, it was the case of *Fletcher v Peck*, 6 Cranch 87 (February, 1810), that really decided the matter This brought in issue the right of the Georgia Legislature of 1796 to rescind the act of 1795 that sold the greater part of what is now Alabama and Mississippi to four sets of purchasers for a cent and a half an acre Marshall said in his opinion in 1810: "The principle asserted is that one Legislature is competent to repeal an act which a former Legislature was competent to pass, and that one Legislature cannot abridge the powers of a succeeding Legislature. The correctness of this principle, so far as it respects general legislation, can never be controverted But if an act be done under a law, a succeeding Legislature cannot undo it The past cannot be recalled by the most absolute power Conveyances have been made, those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights."

This opinion led to the compromise of 1814, whereby Congress, after years of opposition by John Randolph, at last made settlement with those who held the claims growing out of the rascally act of the Georgia Legislature nearly a score of years before The Dartmouth College case opened the eyes of the people to the danger of granting perpetual, irrevocable privileges, and State after State speedily took steps to prevent it, particularly in corporation charters. The idea of "vested rights" has become more and more obnoxious Although many court decisions have declared the Legislature cannot pass laws which impair them, exceptions have been made, and the standing of the doctrine is uncertain even in the courts. The popular instinct shows itself stronger than ever against the theory that good can come from letting one generation tie the hands of the next. Such a theory, indeed, appeals only to men who believe virtue and wisdom will go with them to the grave. It has no charm for men who believe —

"The world advances, and in time outgrows  
The laws that in our fathers' day were best."



The more generally accepted doctrine now is that all rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the Legislature, under the police power vested in it by the Constitution of the Commonwealth, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare. In the exercise of this power, the Legislature may not only provide that certain kinds of property may be seized and confiscated, but may also, when necessary to secure the public safety, authorize them to be summarily destroyed by the municipal authorities, as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decayed or infected food, or abating other nuisances dangerous to health. A striking instance of the view held by a progressive people is found in the American attitude toward the property of liquor dealers. When we prohibited the sale of intoxicating liquor, our legislatures refrained from compensation and our courts upheld them. In England, where vested rights are worshiped, the contrary view prevails, and the necessity of compensating the keepers of public houses is the greatest obstacle in the way of combating the evils of the liquor traffic.

It is well established that no State Legislature can bind its successor, save by law calling into play the provision of the Federal Constitution that no State shall pass any law impairing the obligation of contracts. But can the thing be accomplished through the adoption of a State Constitution or amendment thereof?

The question has come up in connection with constitutional conventions. In various instances they have been held without specific constitutional warrant, and in some cases contrary to constitutional provision for amendment by other methods. For example, the first Delaware Constitution said that part of it ought never to be violated on any pretense whatever, and the rest was not to be changed without the consent of five parts in seven of the Assembly, and seven members of the Legislative Council. Nevertheless the Legislature in 1791 passed an Act calling a Convention, which in 1792 framed the second Constitution of the State. This course was in 1858 defended by Senator James A. Bayard, from that State, in a speech in the United States Senate on the Lecompton Constitution. As one reason

why it would not be unjust to force that Constitution upon the people of Kansas against their will, he affirmed it would be in their power at any time to amend it, notwithstanding positive provisions forbidding amendments for a fixed period, and he asserted the broad principle that a majority of the people could not be restrained by constitutional inhibitions from changing their fundamental law when and as they pleased. He argued that all powers of government rest ultimately in the people at large, that a majority of those who choose to act, may form a government, and that the right to change is included in the right to organize.

Likewise the General Assembly of Maryland, in 1850, called a Convention in direct violation of a provision of its Constitution. In defending this, Senator Reverdy Johnson in a letter published in the *New York Tribune*, June 5, 1865, declared: "No man denies that the American principle is well settled, that all governments originate with the people, and may by like authority be abolished or modified, and that it is not within the power of the people, even for themselves, to surrender this right, much less to surrender it for those who are to succeed them. A provision, therefore, in the Constitution of any one of the United States, limiting the right of the people to abolish or modify it, would be simply void."<sup>1</sup>

Judge Jameson, in comment, holds that the change of a Constitution in a way contrary to its provisions would not be legal, and would be revolutionary. The distinction has an academic flavor, for it matters little whether a process be legal or revolutionary if its results are accepted, and so far they invariably have been accepted. Of course the courts might on some occasion, on some specific issue, object to the results, but it is hard to imagine that if a majority of the people had given their approval at the polls, courts would have the temerity to raise a remonstrance sure to be vain. It is, indeed, apparent, as Judge Jameson says, that a mere majority in number of all the citizens of a State, or of the electors of a State, have no right whatever to act for the whole State, unless they can point to authority to that effect, express or implied, in the Constitution of the State; and that if the action taken or proposed by such majority is palpably in the teeth of a constitutional provision, it is usurping and revolutionary. Yet the idea of the dominance of the ma-

<sup>1</sup> J. A. Jameson, *The Constitutional Convention*, 525 et seq.

majority is so thoroughly implanted in the American mind, that it is not likely to be seriously questioned in our day. It is probable that for the immediate future, at any rate, as in the past, opinion will commonly support the view that where there is no express constitutional prohibition, legislatures are warranted in action by such definite permission, for instance, as that in the Constitution of Massachusetts, to make "all manner of wholesome and reasonable orders," or by justifiable implications to the same effect, and where there may be express constitutional prohibitions, they will be overcome by popular ratification at the polls of action to the contrary.

Despite theory, each generation is likely to decide for itself what is Natural Law. After all it is largely a matter of interpretation, and were it not for the grave consequences that have followed insistence on a rigid doctrine, one would be tempted to dismiss the discussion of it as a mere quarrel over words. It is the fact that very much which has been written about it has concerned the scope to which the word "law" should be extended. In this particular, suffice it to say in summary that the weight of authority now favors restricting the use of the word "law" in matters of politics to the commands of a sovereign power. In matters of ethics, "law" will still be used to designate things deemed to be right. It would be useful if further distinction should be drawn between political laws on the one hand, and "the Law of Nature" on the other, as clarified by Huxley. "The Law of Nature," he said, "is not a command to do, or to refrain from doing, anything. It contains, in reality, nothing but a statement of that which a given being tends to do under the circumstances of its existence, and which, in the case of a living and sensitive being, it is necessitated to do, if it is to escape certain kinds of disability, pain, and ultimate dissolution. The natural right deduced from such a law of nature is simply a way of stating the fact, and there is, in the nature of things, no reason why a being possessing such and such tendencies to action should not carry them into effect."<sup>1</sup>

In the same volume Huxley says (p. 356): "It is a necessary condition of social existence that men should renounce some of their freedom of action, and the question of how much is one that can by no possibility be determined *a priori*. That which it would be tyranny to prevent in some states of society it would

<sup>1</sup> *Natural and Political Rights, Methods and Results*, 349

be madness to permit in others. The existence of a polity depends upon an adjustment of the two sets of forces which its component units, the individual men, obey — the repulsive of natural right, and the attractive and coactive of individual sympathy and corporate dominion. Which of them ought to predominate at any given time must surely depend upon external and internal circumstances and upon the degree of development of the polity "

This is in harmony with the modern tendency to abandon the attempt to define the boundaries of law with mathematical precision. In politics, as in ethics and economics, the ambition of the pioneers in scientific analysis was to delimit everything by the use of the yardstick; or to describe with the accuracy of a chemical formula. Helpful failures resulted. They led the way to recognizing that compromise and expediency are factors beyond the scope of science. Jevons well said. "It is futile to attempt to uphold, in regard to social legislation, any theory of fixed eternal principles or abstract rights. The whole matter becomes a complex calculus of good and evil. All is a question of probability and degree. A rule of law is grounded on a recognized probability of good arising from a certain line of conduct. But as there almost always occur cases in which this tendency to good is overmastered by some opposite tendency, the law-giver proceeds to enact new rules limiting, as it is said, but in reality reversing, the former one in special cases." <sup>1</sup>

<sup>1</sup> *The State in Relation to Labour*, 16.

## CHAPTER III

### JUDGES AND THE ORGANIC LAW

THE courts may be called on to determine (1) what either a statute or a constitutional provision means, or (2) whether the enactment of a statute was within the constitutional power of the enacting body. In both cases the relations of the legislative and judicial branches are concerned, save when the meaning of a constitutional provision affects a litigated issue directly, but the constitutional provisions that are self-executing rarely produce litigation and anyhow need no attention in a study of legislative problems

In mere point of the meaning of words there is of course no distinction between interpreting a statute and interpreting a constitution, but important difference arises from the number of words used. Constitutions have for the most part been made up of brief, general statements, more indistinct of outline than the specific, detailed provisions customarily attempted in statutes. Hence in this respect the courts have a far wider scope of duty than when constitutionality is in issue. The result has been, particularly in the case of the Constitution of the United States, that the Supreme Court has been called upon, has been required, has been compelled, to supplement the work of the original authors, that is, to determine not only what they did say, but also what they ought further to have said — in other words, some think, themselves to write organic law. Thomas Jefferson did not like this and it was with a sneer he said that John Marshall and the Supreme Court were engaged in making a Constitution for the government. As far as developing is making, that was true, and also it was fortunate. Somebody had to expound the wonderfully brief and compact document that came from the Federal Convention. To-day few will regret that it has been done by our Supreme Court rather than by Presidents of alternating partisanship, or Congresses dominated by sectional influences and swayed by every passing gust of emotion.

The charge that judges write new constitutional provisions is what gives rise to present-day discussions, but for many years legislative and judicial functions overlapped or came in conflict

only when the courts held that the enactment of a statute had not been within the constitutional power of the enacting body. Roger Foster thinks the first case in the history of jurisprudence where an act of a national legislature was disregarded as unconstitutional came when Oliver Cromwell was ruling England.<sup>1</sup> John Lilburne excited the hostility of Parliament by his conduct in the prosecution of a claim against Sir Arthur Haslerig, about a colliery that he and Josiah Primate asserted Haslerig had taken from them by force. The Commons determined the petition of Lilburne and Primate to be false, malicious, and scandalous, directing it to be burnt by the common hangman, fining Primate and Colonel Lilburne seven thousand pounds each, and providing that Lilburne should depart the kingdom within thirty days, to suffer the pains of death if he returned. The House, January 30, 1651, passed an Act to carry out its judgment. Accordingly Lilburne went to Holland, but two years later returned to England to contest the validity of the law, was committed to Newgate, and was brought to trial. He filed several exceptions, the most interesting of which to us is that the Act was void as contrary to the fundamental principles of law. In his closing speech to the jury, he argued that the Act was unconstitutional, and upon that ground he was acquitted.

In the colonies questions inevitably arose over conflicts between charter restrictions (in essence constitutional) and legislative acts. Thus very early in the history of Massachusetts Bay the Elders were consulted, much as if they were a Supreme Court. In the course of the colonial period the Privy Council again and again had occasion to hold that the Assemblies had exceeded their powers as set forth in the charters, and this accustomed Americans to seeing a written instrument of government interpreted by authority other than the legislative. Although of course the legislators themselves resented this, thoughtful outsiders must have been taught the benefit of having the validity of laws passed upon by somebody other than those who made the laws.

In 1692 we find the Assembly of Carolina, in what was probably the first petition in the nature of a Bill of Rights drawn in America, setting it forth as a grievance that inferior courts had taken upon themselves to adjudge and determine the powers of the Assembly, and pass upon the validity of certain

<sup>1</sup> Roger Foster, *Commentaries on the Constitution of the United States*, 1, 46-60.

of its Acts. From this it would appear that the Carolina courts were assuming to decide the constitutionality of laws.<sup>1</sup> Episodes of this sort leave no ground for the charge of novelty in the action of the judges in beginning to disregard statutes they held to be unconstitutional, very soon after the State Constitutions were adopted. The Virginia Legislature in May, 1778, passed an act of attainder against Josiah Phillips, an outlaw who had been terrorizing the State. He was captured, convicted, and executed, for highway robbery. In this the act of attainder was disregarded, but it is uncertain whether by the Attorney-General of his own accord, or because the court refused to recognize the act of attainder. Professor Tucker says it was because the court refused and that they directed the prisoner to be tried. If this was so, it may have been the first of the long train of decisions based on unconstitutionality. In New Jersey in 1780 the courts would not give effect to a statute authorizing a trial without appeal before a jury of six. Petitions for redress by reason of their position were sent to the Legislature, but that body took no action in criticism. In 1782 one Caton, convicted of treason, was pardoned by the Virginia House of Delegates without the consent of the Senate. When the Attorney-General moved for execution, the prisoner pleaded the pardon of the House, and the matter was referred to the Court of Appeals. The Chief Justice said: "If the whole Legislature (an event to be deprecated) should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal and, pointing to the Constitution, will say to them: 'Here is the limit of your authority, and hither shall you go, but no further'"

The case commonly referred to as the most important of the early precedents was that of *Trevett v Weeden*, in Rhode Island, where the question arose, in 1786, out of a statute of Rhode Island passed to support the credit of her paper money of that year's issue. The court threw out an action on the ground that the charter from Charles II and the long usage under it had established trial by jury as a fundamental and indefeasible right. The General Assembly summoned the judges before it to account for this judgment. They appeared and gave their reasons, also protesting against the adoption of

<sup>1</sup> Edward McCrady, *History of South Carolina*, I, 244.

any resolution for their removal from office (which had been suggested) until after a formal trial. They were not impeached, but at the ensuing session, their terms of office having expired, they were not re-elected.

William Plumer, Jr., in his life of his father, the eminent William Plumer, tells us (p. 171) how the matter became of consequence in New Hampshire, an episode apparently not familiar to most of the writers on constitutional law. Under the colonial government an appeal was allowed from the ordinary tribunals, in certain cases, to the Governor and Council. During the Revolution the same practice of going beyond the courts of law for redress was continued, and the form it took, under the Constitution of 1784, was that of a special act of the Legislature, "restoring the party to his law," as it was called, that is, giving him a new trial in the Superior Court, after his case had come to its final decision in the ordinary course of law. Against such an act, in favor of a person to whom it was thus attempted to give a new trial, in the case of *McCraiy v. Gilman*, Plumer contended that the law was unconstitutional, and therefore void, on the ground that if it reversed the former judgment, it was repugnant to the Bill of Rights and the Constitution of the State; and that if it did not reverse the former judgment, the court could not render another judgment in the same case while the first remained in force. At the September term, 1791, the court sustained the objection, dismissed the action, and ordered execution on the former judgment. This, though not the first, was by far the most important early instance in which the New Hampshire court pronounced a law of the State unconstitutional. Some clamor was made against the judges, as putting themselves above the Legislature, and attempts were made at subsequent sessions by disappointed litigants, generally without success, to get the passage of laws granting them new trials; but the Superior Court in an elaborate opinion pronounced this unconstitutional. No attempt has been made to reverse this decision.

In 1801, Judge Calvin Pease of the Ohio Circuit Court was impeached for holding a law of Ohio unconstitutional. He insisted that as it was a judicial proceeding, the soundness or unsoundness of his conclusions could not be inquired into as a ground of impeachment. The result was an acquittal.

In New York, in the case of *Dash v. Van Kleeck*, 7 Johns.



477 (1811), the power of the courts in this respect was asserted, and five years later Chancellor Kent declared an act of the Legislature invalid.

The Georgia Constitution left it to the General Assembly to give the Superior Court, if it thought best, appellate jurisdiction, which was done. In 1815, while so sitting, the court declared a certain statute unconstitutional and void, whereupon the Legislature showed its resentment by a set of resolutions, viewing with deep concern and regret the conduct of the judges, and expressing entire disapprobation of the power assumed by them of determining upon the constitutionality of laws regularly passed by the General Assembly. "We do, therefore, solemnly declare and protest against the aforesaid assumption of powers, as exercised by the said judges, and we do, with heartfelt sensibility, deprecate the serious and distressing consequences which followed such decision, yet we forbear to look with severity on the past, in consequence of judicial precedents, calculated in some measure to extenuate the conduct of the judges, and hope that for the future this explicit expression of public opinion will be obeyed."

Kentucky wrangled over the matter for five years, beginning in 1821 by a solemn protest of the Legislature against a decision of the Supreme Court of the United States, holding a State statute unconstitutional. This was the phase of the subject that had received the more attention in the period of the Federal Convention and the campaign for adopting the Constitution. Madison addressed himself to it particularly. Yet enough was said in the important speeches and writings of the time to make it clear that the Convention meant to provide also for judicial review of the laws enacted by the Federal Congress itself, whenever litigation might bring their constitutionality in question. No reasonable man can rise from perusal of the debates in the Convention, the discussions in the State Conventions, and especially Nos. 78, 80, and 81 of "The Federalist," with any doubt on that score. Deliberately and understandingly the Federal Convention defeated the proposal of Madison and Hamilton for a Federal Council of Revision with veto power, of which the judges were to be members, it defeated the proposal to give Congress power to negative or repeal State laws; it adopted the plan of judicial review in case of litigation. When a decade later the matter was brought in political issue

by the Virginia and Kentucky Resolutions, the complaint of Jefferson, Madison, and most of the other anti-Federalists was not that the Supreme Court had pronounced laws unconstitutional, but that it had failed so to do.

The history of the subject as far as it relates to the course of the Supreme Court of the United States is so fully set forth by the standard writers on constitutional law, that its repetition here seems needless. Suffice it to say that while John Marshall's opinions in *Marbury v. Madison* (1803) and other cases have had many severe critics, undoubtedly the weight of legal approval has been given to them. And if by any chance they were wrong, they were nevertheless most fortunate. Recollection of the resentment they aroused, taken with the foregoing instances among those that happened in the States, will show that the conflict between judiciary and legislature is nothing new. Perhaps it is not even more virulent to-day than it has been at previous periods of our history.

Whether the Federal Convention meant also to impose upon the President the duty of determining constitutionality is another question. Anyhow from the start the veto power was construed as calling for the exercise of such a duty. Washington's first veto was based on what he believed to be the unconstitutionality of a proviso fixing the basis of apportionment of Representatives. When he discovered that William Patterson of New Jersey, whom he had nominated as an Associate Justice of the Supreme Court, was a member of the Senate at the time the bill creating that office was passed, and that his term had not yet expired, he so notified the Senate, February 28, 1793. "I think it my duty, therefore," he said, "to declare that I deem the nomination to have been null by the Constitution."<sup>1</sup>

Madison vetoed (February 21, 1811) a bill incorporating the Protestant Episcopal Church in Alexandria, D C, "because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates the article of the Constitution of the United States which declares that 'Congress shall make no law respecting a religious establishment.'" A week later he vetoed a bill endowing a church in Mississippi Territory. "because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle

<sup>1</sup> *Messages and Papers of the President*, I, 137.

and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the Constitution" <sup>1</sup> He also vetoed (March 3, 1817) a bill making appropriations for internal improvements, saying, "I am constrained by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States, to return it" Further: "The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by any just interpretation within the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States"

President Wilson found a novel phase of the matter On the 5th of June, 1920, he signed a bill relating to the merchant marine and containing a section that directed him to terminate within ninety days any parts of commercial treaties inconsistent with the act. He did not do this within the prescribed time and then the public learned that he declined to do it, the reason given being in effect that Congress by its direction had tried to usurp a prerogative vested by the Constitution in him as President In other words he had signed a bill which in part he refused to execute because unconstitutional This, it will be seen, raises the issue of whether it is any less proper to execute than to sign. If Judge Cooley was correct, it would seem as if neither signing nor execution would be justifiable The Michigan Supreme Court, however, in the same year appears to have taken ground opposed in some measure to Judge Cooley's position, for when the Secretary of State, advised by the Attorney General, refused to put on the ballot a constitutional amendment that he believed would be unconstitutional if adopted, the Court decided that it should go to the voters, and declared that it was the function of the court to pass on the constitutionality of a law after its enactment rather than before Possibly President Wilson took President Tyler's view, that as part of the lawmaking process he should resolve doubts in favor of the action of Congress, but that in his capacity as Executive he should exercise his own judgment as to constitutionality This of course would not tally with the position of

<sup>1</sup> *Messages and Papers of the President*, I, 490

the Michigan court, but perhaps the President thought the fact that termination of treaties was in issue, altered the case.

What may be duty when faced with doubt of constitutionality, is a question brought to the front by President Franklin D. Roosevelt in a letter to Representative Samuel B. Hill, July 6, 1935, relating to the so-called Guffey Coal Bill "The situation is so urgent and the benefits of the legislation so evident," said the President, "that all doubt should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality." Each President is required by the Constitution to swear that he will, to the best of his ability, "preserve, protect and defend the Constitution of the United States" Senators and Representatives are to be "bound by oath or affirmation to support this Constitution" May a Congressman vote for, may a President sign, when doubting constitutionality? Those questions have repeatedly confronted Presidents and every legislator of long experience. My own belief is that where doubt is serious, duty and conscience demand refusal. They cannot be honorably evaded by shifting responsibility. Otherwise why the oath?

If it be urged that the veto in American practice is but suspensory and can be overruled by the legislature, being thereby differentiated from the judicial power, it may be answered, first, that the judicial power may also be overruled by the supreme legislature, the people, if it choose to amend the Constitution, and, secondly, that as a matter of fact in the many cases where American Executives, State and national, have based vetoes on the ground of unconstitutionality, their decision has been almost invariably accepted by the legislative bodies

Draw another distinction Washington, Madison, and other Presidents have said certain bills ought not to become law because they were repugnant to the Constitution The courts say certain documents or parts of documents are not laws at all, never were laws, and cannot become laws until the Constitution is amended. This is not mere technical hair-splitting It has grave practical consequence Unquestionably many laws are enacted that would not stand if brought before a Supreme Court. Nobody has personal interest enough, perhaps courage enough, to take them there, and so they stay in force, for good or ill. Remember, then, that only the Executive can even

check the legislative will, unless a litigant chances to invoke the judicial power.

#### CONSTITUTIONAL ASPECTS

Proof appears in plenty that the question of inalienable rights is still very much alive. It was prominent in the campaign of 1924 by reason of the proposal of Senator La Follette, candidate of the radicals for the Presidency, that when the Supreme Court declares a statute unconstitutional, it shall be valid if enacted a second time. Unquestionably the most telling argument against this, in popular appeal, was the allegation that it would let Congress invade or destroy the rights set forth in the first ten amendments — the Federal Bill of Rights. The result of the election was construed by President Coolidge in his message to Congress on the following 3rd of December, to mean that our country does not propose to abandon the theory of the Declaration that the people have inalienable rights, which no majority and no power of government can destroy. "It does not propose to abandon the practice of the Constitution that provides for the protection of these rights. It believes that within these limitations, which are imposed not by the fiat of man but by the laws of the Creator, self-government is just and wise."

In point of certain rights, this makes the Constitution simply declaratory of pre-existing law. Herein the President took the view held by the Supreme Court in the notable case of *United States v. Cruikshank*, decided the year after *Loan Association v. Topeka*. Delivering the opinion, Chief Justice Waite said that the right of the people peaceably to assemble (which is protected by the 1st Article of Amendment) existed long before the adoption of the Constitution of the United States. "In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It is not, therefore, a right granted to the people by the Constitution. The government of the United States found it in existence, with the obligation on the part of the States to afford it protection."

Assuming this to be sound, it follows that pre-existing law,

the law of Nature, may control every form of written law, whether it be the most solemn, the Constitution itself, or statutes enacted thereunder. Cases are not lacking to substantiate this, cases so appealing to the common instinct of mankind that all the theory of all the logicians in the world could not prevail to the contrary. For instance, take one where a murderer, to whom a policy on the life of his victim had been assigned, sought to recover from the insurance company Justice Field, in delivering the decision of the Supreme Court of the United States, unquestionably voiced the belief of all civilized peoples when he said. "It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken As well might he recover insurance money upon a building that he had willfully fired" <sup>1</sup>

Three years later, in the case of *Riggs v. Palmer*, 115 N.Y. 506, a grandfather had made his will in favor of his grandson. The grandfather afterward married again, and said he was going to change his will The grandson, to prevent this, murdered him before the will was changed The court held that although the statute so required in words, the grandson could not take under the will The court so held on the principle that all laws, as well as all contracts, may be controlled in their operation and effect by these fundamental maxims of the common law. no one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own crime, and a thing which is within the letter of the statute is not within the statute unless it is within the intention of the lawmakers

Manifestly the court was seeking grounds upon which to justify itself, and R. Floyd Clarke, questioning them in "The Science of Law and Lawmaking" (p 234), was sound in saying that "on the conceded hypothesis of the supremacy of statute law" the first of the principles cited by the court could not avail to cut down the clear words of a statute giving or withholding a right. As we have seen, however, the supremacy of statute law is far from being conceded, and indeed is virtually denied in this very case The criticism that the rule as to the intention of the lawmakers introduces a contradiction in terms where the meaning of the words is clear, has more validity, unless we may

<sup>1</sup> N Y Mut Life Ins Co v Armstrong, 117 U S 591, Field, J (1886)

suppose that lawmakers are never to be presumed to have intended a violation of Natural Law. Anyhow, whether the conclusion was reached by sound reasoning or not, universal instinct will approve that conclusion.

Declarations of Rights appear in most of our Constitutions. It is not always easy to say whether the rights set forth are natural or artificial. The distinction may at any time assume great importance. To illustrate, note a Massachusetts provision. "Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor" Also Article 30 of the Declaration forbids the legislative to exercise judicial powers, or the judicial to exercise legislative powers. In 1860 in *Talbot v Hudson*, 16 Gray, 417, the Supreme Court held the determination of the Legislature not conclusive that a purpose for which it directs property to be taken is a public use; but the determination is conclusive, if the use is public, that a necessity exists which requires the property to be taken. Said the Court: "The Legislature have no power to determine finally upon the extent of their authority over private rights. That is a power essentially judicial, which they are by article 30 of the Declaration of Rights expressly forbidden to exercise. The question whether a statute in a particular instance exceeds the just limits prescribed by the Constitution must be determined by the judiciary" And: "The Legislature are the sole and exclusive judges whether the exigency exists which calls on them to exercise their authority to take private property" In 1903 the Legislature asked the Court for an opinion as to whether in certain emergencies the public authorities might engage in the sale of fuel, whereupon the Court undertook to examine emergencies in order to determine what of them would make a public use out of that which otherwise would be a private use. In other words the Court undertook to determine what was for the public welfare. In 1917 the situation brought on by the War led to the adoption of an amendment recommended by the Constitutional Convention, which declared the maintenance and distribution of food and other common necessities of life at reasonable rates during time of war, public exigency, emergency, or distress, to be public functions. The query comes as to whether the Court will as in 1903 undertake to determine the existence of emergency. If so, will it not decide what is for the public welfare — in other words, will it not legislate?

The Convention rejected a substitute reading: "The General Court may determine what is a public use." This of course would have gone much farther than the specific proposal in hand contemplated. It would seem, however, to be the logical conclusion short of which no man may stop if he believes it to be unwise in the long run for our courts to share in determining what is for the public welfare.

Justice Miller in *Loan Association v. Topeka* did not mention the Fourteenth Amendment to the Federal Constitution, which was to furnish a new peg on which to hang the doctrine of a supreme fundamental obligation. That Amendment said: "... nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Nobody has ever been able to define concisely and precisely just what "due process of law" means, but Justice Field doubtless interpreted its import correctly in *Barbier v. Connolly*, 113 U.S. 27 (1884), when he said the Amendment intended "not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights, that all persons should be equally entitled to pursue their happiness and acquire and enjoy property," etc. Since then the courts have repeatedly used the "due process" clause to justify applying to statutes the test of whether they are arbitrary or unreasonable. In other words, they have found in that clause warrant for applying "the rule of reason" to legislation, and so, in some eyes, have taken unto themselves legislative power.

### CRITICISM AND REMEDIES

We frequently hear the power of the courts in matters constitutional called a "veto power," and we are told the judges can and do throttle the representatives of the people by annulling their enactments. Recent books and periodicals have contained this charge made by so many responsible men that it cannot be ignored or brushed aside.

The real grievance of those who blame the courts in this matter lies in the possibility that the judges may be influenced in their opinions of what is constitutional, by their judgment in point of policy. Professor Munroe Smith expressed the views



of many when he said: "In the minds of conscientious men, power carries with it a sense of responsibility, and in determining whether national or State legislation is or is not constitutional our judges have been increasingly influenced, consciously or unconsciously, by their opinion of the wisdom or unwisdom of each measure submitted to them. The accumulating mass of decided cases has come to contain so many judgments or dicta representing different points of view that it is seldom difficult to find equally satisfactory arguments for the allowance or disallowance of any law which is neither clearly constitutional nor clearly unconstitutional."<sup>1</sup>

Professor W. F. Dodd holds "The function of annulling statutory or constitutional provisions is primarily a political and not a judicial function, and in many cases the result reached by the courts depends more upon the opinion of the judges as to the wisdom of the measure under consideration than upon specific constitutional limitations. As a rule it would seem that courts have found reasons, sufficient at least for themselves, for annulling practically any constitutional amendment which they strongly desired to defeat."<sup>2</sup>

It cannot be denied that sometimes the popular will is defeated or at any rate blocked by the action of the courts. The remedy most discussed is that their decisions shall be subject to reversal, either by the legislative body or by vote of the electorate. Under the name of "The Recall of Judicial Decisions" this has been a live political issue at intervals in the course of the last twenty-five years. Discussion has been often vigorous, sometimes bitter, usually inaccurate. Misunderstanding and disagreement as to the nature and scope of both the evil alleged and the remedies proposed have confused friends and foes alike. Let us see if analysis can clarify.

As a preliminary, let it be agreed that no intelligent man proposes to reverse by vote of legislature or people the decision of a court where no constitutional question is involved. It would be needless to set this forth were it not for the fact that in the heat of the debate impression to the contrary has sometimes been spread abroad. In reality nothing of the sort is urged.

Constitutional questions may be broadly grouped into two

<sup>1</sup> "Shall We Make our Constitution Flexible?" *North American Review*, November, 1911.

<sup>2</sup> *Revision of State Constitutions*, 243

classes — those that relate to specific provisions and those that relate to abstract provisions

Specific provisions make up by far the greater part of every written Constitution. They concern rather definitely defined rights and what may be called mechanical details, the processes of government, set forth in clear language that can usually be applied by the courts with little serious difference in opinion. In these matters there is no judicial "veto" in the proper sense of that word. It cannot be fairly said that in regard to them the judges control the legislative branch, exercise any power over statutes, or make law. They simply declare that a statute in question is or is not in accordance with the organic law, and therefore is or is not itself a law.

To be sure, the same thing might be said when some abstract provision is the test, but here another factor may enter, that of whether the statute ought or ought not to be the law. To illustrate, take the phrase "general welfare" as it appears in the Federal Constitution and with the same or equivalent words in various State Constitutions. In applying these words opinion as to wisdom is almost sure to be formed and to have influence. Indeed the grant to the legislative branch of all the powers "necessary" for the legislature of a free State, to be found in a dozen or more of the Constitutions, or that in Massachusetts to make all manner of "wholesome and reasonable" laws, seems to compel the exercise of opinion as to wisdom by the judges, if they are to overrule the views of the legislative branch.

The Fifth Amendment of the Federal Constitution says that "no person" shall "be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment says "no State" shall "deprive any person of life, liberty, or property, without due process of law." The words "due process" appear in more than half the State Constitutions and related provisions are in many of the others. Exact and complete definition of "due process" has been attempted by neither our Federal nor our State courts. Were it possible, it would not be desirable, for no human mind could forecast all the contingencies that might call for its application. From general and more or less vague definition, however, can easily be gathered for our purposes the reasons for much of what some call "judicial legislation." Such a definition has been admirably phrased by William D. Guthrie, eminent lawyer and learned writer on legal

topics. After explaining that "due process" is equivalent to "the law of the land" as used of old in England and in our earlier organic documents, he says that the constitutional provision requires "just and equal laws that have a reasonable relation to some purpose within the competency of the legislative power, that are not arbitrary but reasonably adapted to a legitimate end, that conform to established principles of private right and distributive justice, and that observe those general rules which have been established in our system of jurisprudence for the protection of personal rights and were recognized at common law as essential to the orderly pursuit of happiness by free men" <sup>1</sup>

Examine the adjectives and qualifying phrases in this definition and you will see that half of them either require or invite the judges to exercise personal opinion in a way that may not unfairly be called legislative. Hence much of the trouble. To it is added that which comes from another provision in the Fifth Amendment, "nor shall private property be taken for public use, without just compensation." "Public use" does not appear so frequently in the State Constitutions as "due process," but the issue is raised by various provisions about eminent domain and allied topics.

One phrase, "the police power," covers virtually the whole field of dispute. Should the legislature or the electorate have a free hand in placing its bounds, or should they be set by the courts?

Now that what is called "social justice" has come to figure so largely in political controversy, and "social legislation" plays so important a part in the work of lawmaking bodies everywhere, that question has taken on importance in various aspects. Only the mechanics of the situation, however, call for study at the moment.

It is gravely doubtful whether it is possible to draw a definite line beyond which courts or legislatures shall not pass. One course would be to give the full power to the legislative branch, but thus far that has been thought in this country too radical, too dangerous a proposal. Any constitutional amendment short of this would in all probability still leave the scope of judicial power in doubt. The judges might still with reason deem it their duty to determine what is just or reasonable or

<sup>1</sup> "Magna Carta," *American Bar Association Journal*, January, 1929

expedient or whatever it may be called, to decide, for example, what is a "public use," or an "emergency," or an "exigency." There remains, however, one avenue open, running in a direction opposite that of general provision. It is possible to provide that in particular instances within this field the decision of a court may be overruled, either by legislative enactment or by popular vote. This seems to be what the reformers have really wanted. Confined to the twilight zone of the police power, where legislative and judicial functions are blending shadows, at any rate this would not be so dangerous to individual liberty and to property rights as many have feared it would be in the broader form commonly imagined as the purpose.

So confined, the extent of the danger would in the minds of not a few thoughtful men depend on the nature of the reviewing process. Proposals regarding this have varied according to the political temperament of the proposers. The elder Senator La Follette would have given full power to the legislative body, allowing it to reverse the judgment of the court as it would pass an ordinary statute. Mr. Roosevelt, arguing that the judges had made law precisely like legislators, would have put the two groups in precisely the same relation to the people. "In practice," said he, "the people can control their own legislative bodies. The legislator is elected for a short time, and he can be speedily replaced if he misrepresents his constituents. Moreover, wherever the people find that they are thus misrepresented by the legislators, they can, by the adoption of the Initiative and Referendum, take the remedy into their own hands. Now, all that those of us who are discontented with the reactionary or Bourbon decisions, such as those alluded to above, desire to do is to give the people the same right to make their own laws so far as the judges are concerned that they now have so far as the legislators are concerned. I am really advocating only that the people be actually, and not merely theoretically, given the right which the eminent judges above quoted say is theirs and cannot lawfully or with propriety be taken from them."<sup>1</sup> The deduction is that Mr. Roosevelt would have had an objectionable decision of a court reviewed at the polls.

Midway might be a safer process, based on Mr. Roosevelt's own premise, that "a Constitution is merely the highest expression of the law" and that "Constitution-making is the highest

<sup>1</sup> *The Outlook*, August 8, 1914

form of lawmaking" Inasmuch as the subject-matter in question would be constitutional in nature, the logical conclusion is that it should be handled in the way provided for amending the Constitution Some forms of the Initiative and Referendum, indeed, let the people act without the intervention of the law-making body, but the more prudent States still require the Legislature to act first, though the compulsory Referendum may follow if the Legislature does not satisfy Perhaps a reasonable compromise would be to let the Legislature reverse the decision of the Court by a two-thirds vote in successive sessions, with opportunity for a referendum

In substantial effect this would result in a "special amendment" corresponding to the "special bill" so familiar in legislation. Special bills are in essence exceptions to general laws. Logically there seems no reason why there should not likewise be exceptions to general constitutional provisions Toward this rather than toward new general rules, is the tendency W. F. Dodd, in his comprehensive monograph on "Revision of State Constitutions" (p 240), showed how the States are overruling judicial decisions by constitutional alterations Thus when the Supreme Court of Colorado had held invalid a legislative act limiting a day's labor in mines and smelters to eight hours, in 1902 an amendment was adopted by the people of Colorado fixing eight hours as a working day in mines Montana in 1904 and Oklahoma in 1907 introduced into their Constitutions provisions limiting a day's labor in mines to eight hours A series of decisions by the New York Court of Appeals, beginning in 1901, held to be unconstitutional State statutes regulating hours and conditions of labor on State and municipal public works An amendment to the Constitution of New York, adopted in 1905, provides that the Legislature shall have power to "regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare and safety of persons employed" by the State or any civil division thereof, or on public contracts. California in 1902, Montana in 1904, and Oklahoma in 1907 adopted constitutional provisions establishing an eight-hour day upon State and municipal public works California, after three unsuccessful attempts of its Legislature to enact a primary election law that would meet judicial approval, in 1899 adopted a constitutional amendment upon this subject in order to overcome difficulties raised

by the court. Michigan in 1902 by constitutional amendment authorized its Legislature to provide by law for indeterminate sentences, thus overcoming a decision of the Supreme Court declaring such a law unconstitutional. New Hampshire in 1903 adopted a constitutional amendment specifically authorizing the taxation of franchises and inheritances, in order to overcome decisions of the Supreme Court declaring such taxes unconstitutional.

This resort is meeting the need in the individual States, but it is virtually impracticable for use in overcoming final decisions that Federal statutes are unconstitutional. There is in effect no appeal from the decisions of the United States Supreme Court. This makes the radical unhappy. It pleases the conservative who thinks that the Justices know better than Congress both what the people want and what they ought to want. As typical of that view, take the opinion of one who was a member of Mr. Roosevelt's Cabinet, but whose personal loyalty led him nevertheless to espouse Mr. Roosevelt's cause in 1912. It was in the preceding year that Charles Bonaparte wrote:

"Our judges are far more capable than our legislators to give expression and effect to the people's will, they are also more competent and more faithful interpreters of what is the people's will, because far less liable to be misled as to this by mere outcry from the press or the tawdry gabble of agitators; for, ever since the days of the Three Tailors of Tooley Street, the query 'What is' or 'Who are the people?' has been matter of debate and often of dispute; and, although it has received, for practical purposes, many different answers in different countries and at different times, the legal 'people,' that is to say, that part of the community empowered by law to speak and act for the whole, has been always and everywhere a minority of all the human beings subject to the 'people's' will." <sup>1</sup>

If it be true that our judges are far more capable than our legislators to give expression to the people's will, then our Constitutions are all a grave blunder and our form of government is a stupidity. Fortunately for the great American experiment, this is not yet generally believed. As a whole we still think legislators better qualified than judges to know what the people want. We still think that the circumstances of their lives discourage judges from mingling with their fellow men, that the

<sup>1</sup> "Judges as Lawmakers," *Green Bag*, October, 1911.

nature of their work leads them to keep their eyes on the past rather than the future; that they can know little of the great forces at the moment molding public opinion. We still think that legislators coming at frequent intervals fresh from the people, chosen representatives from all walks of life, are as a body better qualified to say what shall be the law, and that the judges are better qualified to say what is the law and what shall be its application to particular cases

It is a temperate summary of the situation with which Professor Charles Grove Haines closes his book on "The American Doctrine of Judicial Supremacy" (1914): "As we review the history of the American doctrine, it seems more likely that a restriction of the realm within which laws may be invalidated, an easier method of changing the fundamental law, and a less hostile attitude toward legislative innovations on the part of lawyers and judges, will remove the chief grounds of complaint against the judiciary with respect to what is termed judicial legislation, and will make it possible and desirable, even to those who believe in the ultimate rule of the people, to retain in State and Federal government the power of the courts to invalidate acts as a salutary check upon hasty and careless legislation. The supremacy of law as announced by the courts, and the subordination of other departments of government to the judiciary, which together constitute the basis of the American doctrine of judicial supremacy, may then cease to be regarded as imposing legal obstructions and insuperable barriers to progress, and may rather be conserved as a valuable and useful corrective to the developing practice of popular law-making"

The proposal for the recall of judicial decisions, at any rate in its original form, does not appear to have gained any foothold in other countries. In the Australasian Federal Convention of 1898, the resolution of Mr. Holder of South Australia that in the event of any Commonwealth law being declared *ultra vires* by the High Court, the Executive might upon a majority vote of each House of the Legislature, refer the law to a plebiscite of the electors, and if approved by them the Constitution should be deemed to have been enlarged, and the law deemed to have been *intra vires* of the Constitution from the passing thereof, was withdrawn by its proposer after a debate in which it appeared that he had no supporters in the Convention.

A frequent criticism of present conditions in the United States is based on the fact that though in theory we are supposed to have the benefit of the collective wisdom of the Supreme Bench, in practice the Court may be so nearly evenly divided that the decision seems the judgment of one man<sup>1</sup> It is in fact a criticism equally pertinent wherever action is by majority vote, but that does not lessen the apprehension of danger felt by many at having the decision of questions of the gravest governmental moment rest, as it seems to them, on the shoulders of a single fallible human being They think there would be safety in numbers. On an occasion in the course of the Reconstruction Period the matter was warmly agitated. When General Ord, in November, 1867, had arrested an editor named McArdle for alleged libelous and incendiary publications, and McArdle had appealed to the Supreme Court after *habeas corpus* proceedings, Congress was in trepidation as to the outcome of the case and was resolved to take no chances. Various legislative remedies were proposed One was to require a unanimous vote of the Supreme Court to pronounce any act of Congress unconstitutional and void. A bill requiring a two-thirds vote of the Court in such cases actually passed the House January 13, 1868, by 116 to 39, but it was never considered in the Senate

A few of the States have taken action of some sort in the matter. South Carolina in 1895 provided that when the Justices of the Supreme Court or any two of them found a question of constitutional law to be involved in a case before them, they should call to the assistance of the Supreme Court all the Justices of the Circuit Court. A South Carolina attorney tells me the experiment did not prove on the whole successful. When the four Supreme Court Justices and the dozen Circuit Court Justices were assembled, counsel found themselves much in the position of arguing to a jury Among so large a number it was natural for a variety of opinions to develop Sometimes the majority would reach a conclusion along differing lines of reasoning. The minority would produce several opinions at variance with each other. So the last state of the law was worse

<sup>1</sup> Common belief as to the extent of this is wrong. Of 24,016 public acts and resolutions enacted by Congress in one hundred and forty-six years, only fifty-nine have been held unconstitutional wholly or in part These required the Supreme Court to decide seventy cases In twenty-seven of these, including four of the New Deal cases, the Court was unanimous Only ten were voided by a majority of but one Justice *United States News*, June 10, 1935



than the first. When the number of Supreme Court Justices was increased from four to five, and the position taken by any two of them could no longer result in affirming the judgment of the Court below, as the Constitution of 1895 had provided, occasion to call in the Circuit Court Justices was lessened and of late there has been no resort to the power.

Virginia, with a Supreme Court of Appeals made up of five judges, any three of whom might hold a court, provided in 1902 that three must concur on a matter of constitutionality. If no more than two agree on a constitutional question essential to the determination of a case, it is to be reheard by a full court. Ohio said in 1912: "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void." The Supreme Court has since held that it will not take jurisdiction of a case involving a constitutional question if the constitutional question claimed to be involved in the case was not submitted to the Court of Appeals nor decided by such Court.<sup>1</sup>

Chief Justice Carrington T. Marshall of the Ohio Supreme Court has described how the provision works in his State.<sup>2</sup> The inevitable effect, he says, is to give greater force and effect to the opinion of two members of the Court than to the other five, in the most important constitutional questions coming before the Court. The exception as to the affirmance of a judgment of the Court of Appeals brought a singular and serious muddle. The judgment could not be reversed save by the vote of six of the seven Justices. Two supported the judgment. Later the Court of Appeals in another Appellate District declared the law in question to be unconstitutional. The case was promptly taken to the Supreme Court on error, where, with the power to affirm by majority vote, the finding of the lower court was sustained. The result is that in two Appellate Districts, including the city of Cleveland, the statute is constitutional, and in another, including the city of Cleveland, it is unconstitutional.

Nebraska in 1920 changed her Constitution by directing that "no legislative act shall be held unconstitutional except by the concurrence of five Judges" of the seven composing the Supreme Court.

<sup>1</sup> *Hoffman v. Staley*, 92 Ohio St. 505 (1915)

<sup>2</sup> *United States Daily*, Sept. 27, 1920

## JUDICIAL OPINIONS

The oldest safeguard against unconstitutionality is that of getting judicial opinion before legislative enactment instead of afterward, mindful of the adage about locking the stable door after the horse is stolen. From early times, the King as well as the House of Lords, whether acting in judicial or legislative capacity, had the right to demand the opinions of the twelve judges of England. In 1387 Richard II put to his judges a long string of questions (2 Stat Realm, 102-04). In the reigns of Henry VIII, of Philip and Mary, and of James I, the judges freely gave opinions, when required by the House of Lords, upon questions of the privilege of members of Parliament from arrest; and in the first year of Queen Elizabeth, the opinion of the judges was taken by the House of Lords upon such a purely parliamentary question as the manner of exercising the right of voting by proxy.

There are expressions in Lord Coke's writings to the effect that the judges ought not to give opinions upon any law, custom, or privilege of Parliament, but it is to be observed that in the passage in which he is particularly treating of their duties when summoned to act as assistants to the House of Lords in matters of law, he qualifies the statement by the words, "as hath been said," clearly signifying that he was not so much stating his own opinion, as referring, according to his habit, to the cases which appeared to support the position.

After the Revolution of 1688, so sturdy an asserter of the independence of the judges as Lord Holt joined with the other judges of the time in opinions to King William III upon the extent of the power of pardon, and to Queen Anne upon the question of whether a writ of error should be granted as of right; and as late as 1760 Lord Mansfield, Chief Justice Willes, and other judges, gave an opinion to King George II, upon the jurisdiction of a court martial to try an officer, after his dismissal from the army, for a military offence committed while in actual service. "We are not aware," said the Supreme Court of Massachusetts, "of any instance since 1760 in which the Crown has exercised the power of asking the opinion of the judges. But the right of the House of Lords to put abstract questions of law to the judges, the answer to which might be necessary to the House in its legislative capacity, has been often acted on in modern times"<sup>1</sup>

<sup>1</sup> Opinion of the Justices, 126 Mass 502

In colonial America there is reason to think the Governors here and there exercised the right as matter of course, doubtless taking the practice in England as precedent enough. So it was not unnatural that upon the formation of the Union President George Washington should turn to the judiciary for counsel. In 1793 he put to the Justices of the Supreme Court a series of questions covering the subjects of difference with Genet, the French minister, rising from his claim of right to fit out as a privateer a captured English merchantman and send her cruising. They replied that they deemed it improper to enter the field of politics by declaring their opinions on questions not growing out of some case actually before them. No further request of this kind has been made to a court of the United States, except such as may have been addressed to the Court of Claims.

Canada took the idea from the mother country. The Dominion and seven of its Provinces permit the Executive to secure advisory opinions, but the power has not been extended to the legislative branch. The opportunity has been resorted to sparingly, whether by the Governors-General or the Lieutenant-Governors of the Provinces.

The legislative branch first secured the right in Massachusetts. John Adams in drawing the Constitution of 1780 had followed English precedent by giving the power of asking advice to the Governor and Council and to the Upper House, which corresponded to the House of Lords. By amendment on the floor of the Convention the lower House was included, the provision being made to read: "Each branch of the Legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court upon important questions of law and upon solemn occasions." New Hampshire copied this in 1784, and the example was followed by Maine in 1820, Rhode Island, 1842, Florida, 1868, Colorado, 1886; and South Dakota, 1889. Missouri had the provision from 1865 to 1875. In Florida and South Dakota the Constitution gives the right to the Governor only. By legislation the right was given to him in Delaware (1852) and in Vermont (1864), but it has been used little if any in Delaware, and in Vermont the statute was repealed in 1915.

After the States were organized, when occasionally a Governor or a Legislature would without authority either consti-

tutional or statutory, ask a Supreme Court for advice, it would generally be given without much demur, but the tendency of late has been for the courts to decline, partly on the ground that there was no constitutional warrant for the request. In Minnesota the judges refused (1865) to recognize the validity of a statute in the matter. Recently, however, the Alabama Court has taken the opposite view, holding for the first time to be constitutional a statute empowering Governor or Legislature to call for opinions. The Act in question, that of February 13, 1923, specified that its object was "to give more confidence and assurance to the validity and constitutionality of important acts or contemplated acts of the Governor and the Legislature."

Even where there have been constitutional provisions, the judges have often shown much reluctance to comply with them. In Massachusetts, in 1877, they plucked up their courage and refused outright to advise the Legislature. The House of Representatives had asked whether under the Constitution a special justice of a municipal, district, or police court vacates his judicial office by accepting a seat in the House of Representatives. The Court declined to give an opinion, on the ground that it was not a legislative, but a judicial question, which could not be definitely or justly decided without trial and argument.<sup>1</sup> Accordingly the matter was brought before the Court by an information filed by the Attorney-General, whereupon the Court held that in such a case the judicial position was vacated.<sup>2</sup>

In 1889 the Justices were asked by the House of Representatives what was the meaning of certain words in a statute. The Justices declined to answer, on the ground that it was not an important question of law nor a solemn occasion. The House thereupon passed a resolve affirming its right to require an opinion on the questions asked, and the resolve was printed with the documents of the House, but that was an end of it.<sup>3</sup>

Again, in 1890, the Justices refused to construe statutory language. In 1913 Governor Foss asked the Court its opinion as to the constitutionality of a certain bill that had passed the Legislature and was about to be laid before him for his action. The Justices declined to advise, on the ground that since the

<sup>1</sup> Opinion of the Justices, 122 Mass. 602.

<sup>2</sup> *Commonwealth v. Hawkes*, 123 Mass. 525, Gray, C. J.

<sup>3</sup> 148 Mass. 623.

Constitution employed the phrase "Governor and Council" in bestowing the power to ask the Court for opinion, the Governor by himself could not exercise that power. They further said: "The circumstances under which the Constitution was framed confirm the view that it was not the intent of its makers to require the Justices to advise the Governor as to his duty of approving or disapproving bills and resolves of the Legislature." They recalled that in those days the residences of the five Justices were widely separated, that the performance of their duties took them to distant parts of the State; that no means of communication more rapid than the horse or sailing vessel were known, and that the Governor had but five days to pass on a bill. "It was obvious that then there was only a remote chance that it ever would be physically possible for him to ask the opinion of the Justices within any such time as would enable him to profit by it. The inference is strong that no such thing was thought of or intended."<sup>1</sup>

In 1887 the Governor of Florida asked the Supreme Court "what character of bills, if any," the Legislature was by a certain section of the Constitution denied the right to pass. The Court declined to give an opinion because the Constitution restricted the Governor to questions "affecting his executive powers and duties." It said "executive" had been many times authoritatively fixed and defined, and that it means "a duty appertaining to the execution of laws as they exist." The Governor's question was in its opinion one affecting a legislative duty.<sup>2</sup>

In Colorado also the court has balked. It declined giving an opinion where it did not appear that the rights in question were the subject of any pending act. It also pleaded the wide range of the inquiry, its own pressure of work, brevity of time, and so on.<sup>3</sup>

While the original Missouri provision was in force, the judges said in one instance: "It is not contemplated by the Constitution that the judges are to give their opinion on any questions which may afterwards come before them for adjudication."<sup>4</sup> They declined on several occasions.

<sup>1</sup> Answer of the Justices to the Governor, 214 Mass. 602.

<sup>2</sup> Opinion of the Justices, 23 Fla. 297.

<sup>3</sup> *In re Irrigation Resolution*, 9 Col. 620 (1886).

<sup>4</sup> *In the Matter of the North Missouri Railroad*, 51 Mo. 586 (1873).

When a new Constitution was drafted for Missouri in 1875, it was proposed that members of the Legislature might require the Supreme Court to pass on the constitutionality of any act. If objection on this score was made in either House, the House was to pass on it, and if the objection was sustained the presiding officer was not to sign the bill. If it was not sustained, any five members might sign a protest, under oath, which was to be annexed to the bill, for the consideration of the Governor. If nevertheless he signed or the bill was passed over his veto, three of the protesting members might within thirty days carry their case into the Supreme Court, and have an immediate inquiry into the facts of the alleged violation of the Constitution, whereupon if the Court found the alleged facts true, the bill was to be null and void. So much of this as pertained to the final appeal to the Supreme Court was not adopted, but the Constitution made provision for the protests. Since nobody is more awake to the need of such a court review than the minority members of the Legislature who have been opposing a bill, the suggestion that they have the right to secure judicial opinion has much to be said in its favor. Of course those who object to any interference with subverting the popular will as fundamentally expressed by the Constitution, will see in this another obstacle to action. As an obstacle to impulse and whim, others would favor.

The reasons given by the courts for their reluctance or refusal are forceful, but not conclusive. It is true that the courts are pressed for time, but so is a Legislature. It is true that a hasty opinion may later embarrass the judges if it comes to the front in a case involving an act they have said would be constitutional, but it is well established that these opinions are not to be binding and save for a score of years in Maine the contrary doctrine has nowhere prevailed. It is true that the judges do not have the help of arguments by counsel, nor usually that of briefs, but in this they are practically no worse off than the Legislature itself, for it cannot be said that the technical information given to a Legislature on the matter of constitutionality is often particularly helpful or that a Legislature as a whole has the legal training necessary to put it to proper use. The fact is that the court is in far better position than the Legislature to form an opinion about constitutionality, whether offhand or deliberate. Even an offhand opinion may help, what-

ever its chances of error. The purpose of the judiciary, as much as that of the Legislature, is to advance the welfare of the community, and it has no right to avoid legitimate opportunity to help. Its attitude toward such opportunity should not be hostile. It will do well to remember what Justice Howell of Rhode Island said in 1786, in the famous case of *Trevett v Weeden*, when he declared that the judges, as assistants to the Legislature, were "ever ready, as constituting the legal counsellors of the State, to render every kind of assistance to the Legislature in framing new laws or repealing former laws."

The importance of the help they could give by early determination of constitutionality can hardly be overstressed. One historic illustration should suffice to show this. If the Missouri Compromise of 1820 had been declared unconstitutional when it was made instead of not until the *Dred Scott* decision in 1857, there is a possibility, even though not large, that the Civil War might have been averted. Surely it is worth while to try any reasonable way to reduce the volume of litigation based upon the question of constitutionality, as well as to give men of affairs greater assurance concerning what they may and may not do. Perhaps not of paramount importance, but incidentally of some consequence, would be the advantage to the legislator whose conscience would be eased of many a qualm if he could have some way of getting the most expert opinion about the constitutionality of some of the measures upon which he must vote.

Logically there is no more reason why a court should be asked to pass judgment on constitutionality after than before the accident of a lawsuit. That word "accident" is not a flourish, but a fact, a constitutional fact. At least this is so in respect of the Constitution of the United States, which limits the judicial power to "cases" and "controversies," with the Court itself holding that the controversies must be "judicial."<sup>1</sup> Furthermore, the cases and controversies must be genuine, for the Court frowns on collusive attempts to get round the barriers it has set up. Observe the serious situation in which we are put by the next obstacle. The Court holds that it must refuse opportunity to the aggrieved citizen unless he can show that his own loss, actual or impending, is distinguishable from that of the taxpayers as a body. Thus the door was closed to a group

<sup>1</sup> *Massachusetts v. Mellon*, and *Frothingham v. Mellon*, 262 U. S. 447.

of responsible, public-spirited citizens of Massachusetts, who thought that Congress had gone beyond its constitutional prerogative in enacting the Maternity Law. The Supreme Court said to them: "The party who invokes the power [to review and annul acts of Congress on the ground that they are unconstitutional] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."<sup>1</sup> It matters not, therefore, how presumptuous or arrogant Congress may be, the citizen has no remedy from the courts, no defense by the Constitution, unless his injury is specific. This, too, could be met by opinion before the harm is done.

Reviewing the subject of advisory opinions, with the help of rather long experience in the legislative branch, part of it in the Commonwealth where the advisory opinion first grew in America and where it yet flourishes, paying the utmost respect to the judiciary and giving all reasonable weight to the adverse views of its members I had reached the conclusion that the advisory opinion has more to be said in its favor than against, that it is a helpful institution which ought to be developed to much wider range of usefulness. Confidence in the soundness of this conclusion is increased upon finding it to coincide with that of Albert R. Ellingwood, who in "Departmental Co-operation in State Government" has given us a most judicious and thorough study of the subject. I agree with him when he says of the advisory opinion: "It seems justified in theory, it has proved its value in practice. In solving the big governmental problem of the day, it is a step in the right direction."

There is another resort that ought to be more used. It would be generally held that the Attorney-General is the legal counsellor of the government, and probably the general practice is for Chief Executives to look to him for legal advice. It is not, however, common for the Legislature to consult him as to the constitutionality of proposed legislation. This is to be regretted. Something would be gained if as Constitutions are from time to time revised, they made clearer the duties of this official, and put on Legislatures the duty of consulting him. It would be well worth while to have all the time of one of his assistants

<sup>1</sup> *Massachusetts v. Mellon, and Frothingham v. Mellon*, 262 U. S. 447.



assigned to the service of the Legislature throughout its sitting, and to require that every bill should at some stage of its progress receive formal endorsement of the law department of the State to the effect that it had been scrutinized. Such a step was taken by Louisiana in its Constitution of 1921, which created a legislative bureau, to consist of the Attorney-General and one member of each House, who should examine and report "as to construction, duplication, legality, and constitutionality" of all legislative measures, before final passage. The example should be followed.

We have not wholly lacked experience in systematic attempt to secure judicial achievement of the purpose, in the way of determining the constitutionality of all proposed enactments without waiting for the accident of litigation. New York began as a State with a method of using the veto power in which judges took part. The Council of Revision was made up of the Governor, the Chancellor, and the judges of the Supreme Court, or any two of them. They passed on all bills, and such as they returned could become law only by the vote of two thirds of the members present in each House. In spite of the fact that the Council could not withstand the attack upon it in the Convention of 1821, and that attempts since then to revive the idea have failed, C. Z. Lincoln thinks the Council was a signal success. He maintains that the power given to the judiciary to prevent the enactment of unconstitutional laws, was of great value in shaping the early legislation of the State, and doubtless accounted to a large degree for the rarity of cases in its early judicial history involving the constitutionality of statutes.<sup>1</sup> However, the experiment gave an adverse lesson in at least one particular, for it brought out the embarrassment unavoidable when a judge must review in his judicial capacity the conclusion reached when exercising the power of revision. One of the bills passed upon by Chancellor Kent as a member of the Council came before him later in court. He remained of the same belief, and then was overruled by the Supreme Court of the United States. Chief Justice Marshall gave the opinion, and half apologetically referred to the circumstances.

Illinois had a Council of Revision of the same sort from 1818 to 1848, and there too it resulted in checking the enactment of unconstitutional statutes. In the course of the thirty years

<sup>1</sup> *Constitutional History of New York*, 1, 747

only four laws were declared unconstitutional by the court. One of these was so declared partly because it had not been submitted to the Council for approval, and another had been passed over a veto. Several important bills disapproved would have violated the Constitution of the State or of the United States.

By 9 Geo IV, c 83, sec 22, July 25, 1828, provision was made "for the Administration of Justice in New South Wales and Van Dieman's Land, and for the more effectual Government thereof." The laws enacted by the appointed Legislative Council of each of these places were to go within seven days to the Supreme Court. Then they were to take effect unless within seven days more they were returned by the judges as repugnant to "this Act, or to any Charter or Letters Patent, or Orders in Council issued in pursuance thereof, or to the Laws of England." If upon such return the Governor in Council after review stood by the proposed law, it took effect subject to overruling by the home government.

Costa Rica has an interesting and suggestive method of resolving doubts about constitutionality before it is too late. If a bill is vetoed by reason of alleged unconstitutionality and is thereupon re-enacted, it goes to the Supreme Court, which is to decide the question within ten days. If the Court says the measure is constitutional, the Executive must then approve. Panama has a like provision, save that the Court has only six days in which to decide. This expedient has at any rate the merit of inviting the Chief Executive to bring in the judiciary whenever he has any doubt. It should also serve a useful purpose in separating constitutional from other questions, for it lessens the chance to use alleged doubts of constitutionality as a pretext for securing ulterior ends, and helps to compel both the Legislature and the Executive to face the real issues.

In the United States various causes have contributed to the lessening of confidence in the courts as the final authority. One of no small consequence is suggested by the change in mental attitude toward the judiciary. It would be idle to deny that in many of the States the judiciary does not stand on so high a plane of respect and confidence as it did seventy-five years ago. The change has kept pace with that from an appointed to an elected judiciary. To argue cause and effect may be met with "*post hoc, propter hoc*," and yet the impulse to

make the charge cannot be resisted by one who as a member of the bar of Massachusetts rejoices that her judges have always been appointed and hopes they always will be, who sees her judiciary continue to hold the foremost position, its reports most authoritatively quoted, its decisions commanding the highest respect, its judgments accepted by the people with the least complaint.

The Massachusetts view of this was clearly and forcibly set forth in a preliminary "Report on Efficiency in the Administration of Justice," prepared by Charles W. Eliot, Louis D. Brandeis, Moorfield Storey, Adolph J. Rodenbeck, and Roscoe Pound, for the National Economic League. In what may be styled fairly the classical period in American law, they say, the bench was for a greater portion of the time appointive or, if elective, elected by the Legislature and tenure was assured for life. Even after the movement for an elective judiciary gained strength about 1850, the traditions of the older order maintained a high standard for some time. Since the Civil War, except in New England, the bench has been elective with few exceptions and for the most part for relatively short terms. The constructive work in American law, the adaptation of English case law and English statutes to the needs of a new country and the shaping of them into an American common law, was done by appointed judges, while most of the technicality of procedure, mechanical jurisprudence, and narrow adherence to eighteenth-century absolute ideas of which the public now complains, is the work of elected judges. The illiberal decisions of the last quarter of the nineteenth century to which objection is made to-day were almost wholly the work of popularly elected judges with short tenure. Moreover, where to-day we have appointive courts, these courts in conservative communities have been liberal in questions of constitutional law where elective judges, holding for short terms, have been strict and reactionary. For illustration one may compare the decisions of the Supreme Court of the United States and of the Supreme Judicial Court of Massachusetts on the subject of liberty of contract, with those of the Supreme Courts of Illinois and Missouri. Also one may compare the decisions of the higher courts of Massachusetts and of New Jersey on the subject of workmen's compensation legislation with the pronouncement of the Court of Appeals of New York.

The defence for electing judges, that they should be kept under the control of the people, is itself a sign of the times. It betrays the modern disposition to look on judges as employees rather than as sages. Subserviency is put above wisdom. Perhaps this is in part due to the great spread of what is called education, leading masses of men to think they too are equal to dispensing justice. One recalls how James I, "the wisest fool in Europe," tried to convince Lord Coke that the King was competent to dispense justice, because the law was supposed to settle cases through reason, and the King had reason as well as the judges. Coke replied, "True it is that God has endowed your Majesty with excellent science as well as great gifts of nature, but your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this your realm of England, and I crave to remind your Majesty that causes which concern life, or inheritance, or goods, or fortunes of your subjects are not decided by natural reason, but by the artificial reason and judgment of the law "

The need of artificial reason and judgment is something most men who have not studied the law cannot understand, will not accept. Yet it is as much a fact to-day as it was when Lord Coke spoke.

Another cause for the greater disposition to doubt the infallibility of the courts is the belief that they have permitted themselves more and more to be swayed by political considerations and by personal views of expediency. If this be true, perhaps the origin of it may be laid at the door of Andrew Jackson, who made his unconfirmed Secretary of the Treasury, Roger Taney, Chief Justice of the Supreme Court, for the purpose, it was charged, of giving effect to Jackson's intensely partisan views. This appointment years later brought the Dred Scott decision, leading half the country to believe the Supreme Court had yielded to partisan impulse. You may read its effect in the speeches of Abraham Lincoln on the Nebraska question. When he came to be President, in his first inaugural message (March 4, 1861) he gave utterance to the apprehension of the North, even if at the same time trying to avoid criticism of the court. "The candid citizen," he said, "must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between par-

ties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes "

The same attitude was taken by one of the subtlest of American writers on political science, Elisha Mulford, who wrote "The Nation" under the mental conditions that prevailed in the North during the period of Civil War and Reconstruction. The concession to the judiciary of an ultimate decision in the political sphere, he said (pp. 201-03), would be the reference of the destination of the State to a régime of lawyers, and, as it is now organized, to a power which is not responsible to the people, and holds its position for life, and whose action is a precedent which is presumed to be final and beyond reversal, and whose opinion is a decision from which there is no appeal. It is the poet, and not the historian of laws, who says that freedom broadens from precedent to precedent. The formative political power belongs only to the power which is representative of the people's will. The judiciary is silent, until the consideration of a case opens its lips. To make the opinions of the judiciary a finality in the political order, would fetter the free spirit of the people, confining it, not in the assertion and recognition of law, as the determination of the organic will, but, in the conformance to a mere legality. The past by its precedents would impose its authority upon the present. The energy of the people perishes when precedents become the substitute for the action of a living will and the strength of a living spirit. The Israel which once had the kings and prophets, has then only Rabbis of the law.

Although the Electoral Commission of 1876 did not perform a lawmaking task, inevitably its decision in favor of Hayes and against Tilden was construed as partisan, and the unfortunate though apparently necessary share of five Supreme Court Justices in that episode, with the decision hanging in the end upon the views of one of them, added materially to the popular belief that even judges are not beyond the influence of partisanship. Then, too, the *Legal Tender* decision, reversed when new judges were appointed, and followed in the next generation by

reversal of the position on income taxes, strengthened the growing conviction in the public mind

Furthermore, after two centuries or so, we have come to general recognition of the truth of Bishop Hoadly's dictum: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them " In our own time one of the most clear-sighted students of the law has gone so far as to conclude. "The Law of a country or other organized body of men is composed of the rules for conduct that its courts follow and that it holds itself out as ready to enforce: no ideas, however just, that its courts refuse to follow are law, and all rules which they follow and to which it enforces obedience are Law " <sup>1</sup> Such recognition of the real extent of judicial power has contributed to increase the jealousy of it, has added to the conviction that it must be kept within proper bounds

The result of all this bids fair to be a transfer of some additional part of the law-declaring function from the judicial to the legislative branch of the government, not a great part, but enough in the popular estimation to restore the balance. Anything so revolutionary as a complete subordination of the judicial to the legislative is not in sight. As long as courts exist, they will continue to share in declaring what custom has been and is; they will continue thereby to declare what formulation of it shall receive obedience until somebody speaking with authority otherwise directs.

<sup>1</sup> J. C. Gray, *The Nature and Sources of Law*, 291 (1909)

## CHAPTER IV

### OVERLAPPINGS

THE men who framed our Constitutions were mostly practical men, with long experience in the conduct of government. They believed in separating the powers, but were not so absurd as to suppose this should be done by making three water-tight compartments without connection. They also knew that even if pure theory alone were to determine, there are some functions of government not clearly belonging to any one of the three departments, and other combining features that may be related to two of the departments or even to all three. Let us dispose first of some of the less important of these

The judicial department created under the Federal Constitution took occasion to resent very early an attempt to burden it with executive duties. The first Congress, in 1791, passed a bill directing the Supreme Court and the subordinate judges to investigate and to make a list of persons entitled to pensions under the invalid pensioners' act. The Circuit Judges for the district of Pennsylvania declined to do this and sent to the President a letter deploring the necessity for their action and laying before him "the sentiments which on a late painful occasion" had governed them in their decision to this effect. Two of the North Carolina Judges, Iredell being one of them, likewise gave him their reasons. The Circuit Judges of New York, headed by Jay, averred that the duty was not judicial, but evaded flat refusal by assuming they had been designated to perform it in the capacity of commissioners. Washington transmitted the New York and Pennsylvania letters to Congress and the obnoxious act was repealed.

Michigan was the first State to face the evil of loading the judiciary with extra-judicial duties. In her second Constitution (1850) she provided that save for a reporter of decisions and the filling of vacancies in the offices of clerks and prosecuting attorneys, no judge of the supreme or circuit courts should exercise any power of appointment to public office. In 1868 Louisiana said that no duties or functions should ever be attached by law to the supreme or district courts, or the several

judges thereof, but such as are judicial Four years later West Virginia said the Legislature should not confer on any judge, or court, the power of appointment to office, further than provided for in the Constitution The next year Pennsylvania said in effect the same thing, though restricting it to the Supreme Court, and North Dakota and Wyoming copied the Pennsylvania provision in 1889 In the other direction was a provision in the Tennessee Constitution of 1870 to the effect that the judges of the Supreme Court should appoint an Attorney-General and Reporter, but it may be argued that the duties of such an officer properly fall within the judicial department

If determining the punishment to be inflicted for crime is a judicial function, then mitigation or annulment of the penalty might also be held to be the province of the judiciary. Nobody has urged this, so far as I am aware, but there has been difference of opinion as to whether pardoning should vest exclusively in the executive branch, exclusively in the legislative branch, or be shared between them In the Federal Convention Mr. Sherman wished that the President should have power to grant reprieves only until the ensuing session of the Senate, and pardons only with the consent of the Senate, but he won only the vote of his own State, Connecticut He went beyond the practice with which he was familiar, for from at least the first printed edition of the Connecticut laws they had said that the General Court only should have power to grant pardons, suspensions, and gaol delivery in capital and criminal cases A section of the Constitution of 1818 reads. "The Governor shall have power to grant reprieves, in all cases except those of impeachment, until the end of the next session of the General Assembly, and no longer" This would seem to have left the pardoning power in the hands of the legislative branch In 1875 an amendment was adopted giving to the General Assembly the power, by a vote of two thirds of the members of both branches, to restore the privileges of an elector to persons who may have forfeited the same by reason of crime. The State now has a Board of Pardons appointed by the Governor, of which he is a member, and in which he has apparently no more weight than any of the other five members.

Rhode Island in 1854 took the pardoning power away from the General Assembly, giving it to the Governor, but he must exercise it by and with the advice and consent of the Senate.



California gave to the Governor the power to suspend execution of sentence upon conviction for treason until the next meeting of the Legislature, which body might then pardon, direct execution of sentence, or grant further reprieve. When in 1879 it was added that "neither the Governor nor the Legislature" could pardon or commute sentence in any case where the convict had been twice convicted of felony, unless upon written recommendation of a majority of the Judges of the Supreme Court, it might be inferred that the right of the Legislature to pardon in other cases still existed.

The power of the President of the United States to grant reprieves and pardons is complete and exclusive, not to be interfered with by the legislative branch. After the Civil War an Act prohibiting all persons from practice before the Federal courts without taking a specified test oath as to participation in the Rebellion, was declared unconstitutional.<sup>1</sup> In that same period an Act provided that persons whose property had been taken as captured, then abandoned and sold, could recover the proceeds in the Court of Claims, on proof that they had been loyal citizens. The Supreme Court decided that a pardon made proof of loyalty unnecessary. Thereupon Congress passed an Act declaring it necessary, "notwithstanding any Executive proclamation, pardon, amnesty, or other act of condonation or oblivion." This the Supreme Court held unconstitutional, Chief Justice Chase saying, "The legislature cannot change the effect of such a pardon any more than the Executive can change a law."<sup>2</sup>

Amnesty came under consideration in *Matter of Doyle*, 257 N. Y. 244 (1931). This was a case involving privilege of witnesses. A resolution in which the Governor had no share, creating a legislative committee, provided that if a witness claimed excuse or privilege and was denied, he was not to be subject to prosecution or penalty. Justice Cardozo said this resolution, if valid, was in effect an act of amnesty, and that a power to suspend the criminal law by the tender of immunity is not an implied or inherent incident of a power to investigate. "There are precedents in the books for what is sometimes called a legislative pardon. If they are scrutinized, they will be found in every instance to have been statutes in the usual form. They

<sup>1</sup> *Ex parte Garland*, 4 Wall. 333 (1866)

<sup>2</sup> *United States v. Klein*, 13 Wall. 128 (1871)

were acts of amnesty or indemnity adopted by the Legislature with the Governor's approval " <sup>1</sup>

Naturalization is another function in the twilight zone. In Athens the privilege of citizenship, deemed a very distinguished favor, could be obtained only by the consent and decree of two successive assemblies of the people. Likewise in the colonial period of America the power to naturalize was treated as legislative, being habitually exercised by the General Court of Massachusetts Bay and probably by the assemblies of all the other provinces. The delegates to the Federal Convention seem to have taken it for granted that this was natural, for without recorded discussion of this phase of the matter they specified that one of the powers of the Congress should be, "to establish a uniform rule of naturalization throughout the United States," and nobody seems to have taken issue with Madison when in speaking to a motion about the qualifications of Senators, he assumed it to be within the power of the national Legislature, by special acts of naturalization, to confer the full rank of citizens on meritorious strangers. It can hardly be questioned that the establishment of the rule authorized by the Constitution is a legislative function, but the application of such a rule raises a more difficult question. The power has been vested by Congress, with the assent of the State Legislatures, in the judicial tribunals of the States, as well as those of the nation. The Supreme Court of Massachusetts has justified this by saying that as the power "requires a final determination of all matters of law and fact involved in the admission of the applicant to citizenship, it may appropriately be made a subject of judicial investigation and decision " <sup>2</sup> Whether or not this reason for giving the work to the judiciary rather than to the executive branch, could be fairly questioned, there can be little doubt that the function ought not to be exercised by the legislative branch. A legislature is unfit to apply the rules that it formulates in statutes.

Another topic involving the overlapping of legislative and judicial functions, if indeed it be not the granting of purely judicial functions to the legislative branch, that of contested elections, I have discussed elsewhere.<sup>3</sup> Since then the Supreme

<sup>1</sup> See 4 Wigmore on Evidence, § 281

<sup>2</sup> Case of Supervisors of Elections, 114 Mass 247, (1873).

<sup>3</sup> Robert Luce, *Legislative Assemblies*, ch x

Court, in *Barry v United States ex rel Cunningham*, 279 U S 597 (1929), has explicitly held that the power to judge of elections, returns, and qualifications is "not legislative but judicial in character." This strengthens my own conviction that just as far as possible while complying with constitutional requirements, the determination of contested elections should be turned over to the courts.

In the same volume, in the chapters on "Privilege" and "Contempt," I have discussed the exercise of judicial power by the legislative branch in such matters affecting members as libel, slander, assault, arrest, testimony.<sup>1</sup> Instances there given show the dangers of putting justice in the hands of lawmakers, but perhaps on the whole it is better to let the legislature protect itself.

Tying the executive and legislative branches together by having the second man in executive rank preside over the Senate seems to have been a New York idea. It appeared in the first Constitution of that State (1777) and in no other before the Federal Convention was held. There it came out of the Committee on Detail and was adopted with strangely little discussion, after debate to which Madison gives only a page. Gerry and Randolph opposed. Williamson observed that such an office as Vice-President was not wanted. Colonel Mason, ever awake to encroachment on the rights of the Senate, objected that the proposal mixed too much the legislative and executive, and then he branched off to other questions. Sherman alone came out squarely in defense. If the Vice-President were not to be president of the Senate, he would be out of employment; and some member, by being made president, must be deprived of his vote except in the case of a tie, which would be seldom. The proposal carried, eight States to four. Since then it has so approved itself to the States that thirty-four of them now have their Lieutenant-Governor preside over the second branch. All but two specify that he is to have the casting vote in case of ties. Michigan says he is to have no vote. Minnesota is silent as to his powers. Half a dozen States give him the right to debate in Committee of the Whole and three of them let him vote when in such committee.<sup>2</sup>

<sup>1</sup> Robert Luce, *Legislative Assemblies*, 471 et seq.

<sup>2</sup> Also see Robert Luce, *Legislative Procedure*, ch. x, "Presiding Officers."

There is no logical reason why a Vice-President or Lieutenant-Governor should have anything to do with the legislative branch. Usually without power to affect legislation, he discloses the ordinary ineffectiveness of a leader lacking authority. Experience has not shown him likely to be a channel of communication between the Chief Executive and the Senate. Rarely is he even in the confidence of either. In the election not the least attention has been paid to his capacity for presiding and he may or may not be able to administer parliamentary law. The best to be said is that it gives him something to do, and if he holds office for the first time, acquaints him somewhat with the processes of government.

The relations of the Executive to the convening, prorogation, and adjournment of the legislative body have been discussed in another volume.<sup>1</sup> It was there shown by episodes from the history of Parliament and the colonial Assemblies how natural it was that the framers of our early Constitutions felt it necessary to secure that the legislative branch should as far as practicable control its own sittings. This was so self-evident to them that they made provision accordingly with little or no discussion. In the Federal Convention it was apparently the unanimous opinion that the President should have no power in connection with the beginning of the regular sessions of Congress, or its usual recesses, and that only of necessity or paramount expediency was entrusted to him the power of adjournment in case of disagreement between the two Houses.

The constitutional provision had one effect of importance to the possibilities of which the framers seem to have given no thought. This first came to the surface nearly half a century later when the business of Congress had so grown as to prolong unduly the first session of each term, or perhaps in those days there were men who thought there was too much legislation, or possibly some believed the work could be done more quickly. Anyhow a bill was passed setting the second Monday in May for the adjournment of every subsequent session unless the two Houses should otherwise provide. President Jackson vetoed it on the ground that this was not constitutionally a proper subject for legislation. The two Houses of each Congress were to try to agree on a date for adjournment and this bill would deprive him of his function of deciding in case of disagreement.

<sup>1</sup> Robert Luce, *Legislative Assemblies*, 171 et seq.

Although Webster, Clay, Calhoun, and Leigh differed with him, the veto was sustained <sup>1</sup>

Now, a century later, the provision may again interfere. Critics of what is popularly styled "the lame duck amendment," that for altering the Congressional schedule so that each regular session shall begin in January, have gone so far as to predict that it will lead to Congress sitting the year round, in which they see the prospect of calamity, or at any rate serious injury to the public welfare. If Jackson was right, this cannot be prevented by statute, inasmuch as one Congress cannot control its successors in the matter. To be sure, Congress can never bind its successors. They can always repeal. That, however, is not always easy and is usually difficult. So whether Jackson was right or not, that veto of his will probably result in every Congress deciding for itself and for itself only as to when to adjourn sessions.

In 1904 (January 29) Representative McDermott of New Jersey sought to convince the House that the President's authority in this matter extends only to sessions called on extraordinary occasions, that is, what are commonly called special sessions. The next day Charles W. Littlefield of Maine, highly respected for his ability as a lawyer, took opposite ground. He showed that in the Federal Convention the Committee on Detail made report in which the clauses concerned were separated, and that they were combined later by the Committee on Detail, which had no authority to make substantial change. The issue did not come to a vote.

No questions relating to the separation of powers present more difficulties than those springing from the right and duty of a legislative body to seek information. That this may be done for the purpose of making laws, is beyond dispute. Whether it may also be done for the purpose of seeing if the laws are properly executed, is the field of controversy. The issues have already been somewhat discussed in a previous volume <sup>2</sup>. Since that was written the matter has received greater attention by reason of certain investigations by committees of the United States Senate, which resulted in two important decisions by the Supreme Court <sup>3</sup>. Also there have been published at least

<sup>1</sup> Robert Luce, *Legislative Assemblies*, 140

<sup>2</sup> Robert Luce, *Legislative Procedure*, 170 et seq

<sup>3</sup> *McGrain v. Dougherty*, 273 U S 135 (1927)

*Sinclair v. United States*, 279 U S 263 (1929).

three scholarly discussions of the subject,<sup>1</sup> which between them cover the ground so thoroughly that there is here little to be added beyond personal opinion from the point of view of a legislator.

It is well to bear in mind what Chief Justice John Marshall said: "How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated." The recent court decisions and academic discussions strengthen my own belief that there is here a no-man's land which can never be mapped. The legislative branch can always aver that whatever it does is done for the purpose of making law. The courts may only hold that in a particular instance the averment is unreasonable. There can be no certainties.

#### IMPEACHMENT

Impeachment is one of the important exceptions to the application of the doctrine of the separation of powers. Blackstone explains the cause (IV, 260). "Though in general the union of the legislative and judicial powers ought to be more carefully avoided, yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either dares not or cannot punish." His reason for giving judgment to the Lords breathes of another age than ours. "It is proper," he said, "that the nobility should judge, to insure justice to the accused, as it is proper that the people should accuse, to insure justice to the commonwealth."

It was in times and under conditions quite different from ours that the need of a special tribunal and proceeding for political offenders of the first magnitude came to be felt. The nefarious Lord Latimer, the King's chamberlain, and Richard Lyons, the King's agent with the merchants, were in 1376 the first to be impeached. Latimer had been guilty of every sort of misbehavior in office. Lyons had been his partner in gigantic financial frauds. They were convicted, but in the end the attempt

<sup>1</sup> C. S. Potts, "Power of Legislative Bodies to Punish for Contempt," 74 *Univ. of Penn. Law Review*, 691, 780 (1926).

James M. Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 *Harvard Law Review*, No. 2 (1926).

Marshall Edward Dimock, *Congressional Investigating Committees*, Johns Hopkins Press (1929).

to bring Latimer to justice failed. Encouraged by their temporary success, the Commons next attacked Alice Perrers, one of the court ladies who had served the Queen and had assumed the position of an influential minister. Against her, award of banishment and forfeiture was found. Under the Tudors the proceeding fell into disuse, they preferring bills of attainder or of pains and penalties. It was revived in 1621 against Sir Giles Mompesson, who, having obtained a patent for gold and silver thread, sold it of baser metal, and who is said to have used extreme violence and oppression in the matter of another patent — for licensing inns and alehouses. The Lords passed on him as heavy a sentence as could be awarded for any misdemeanor.

In America the first of the Constitutions to provide for impeachment was that of Virginia. It was to be made by the House of Delegates and prosecuted by the Attorney-General (or such other person as the House might appoint), "according to the laws of the land." The next paragraph provided that if one of the Judges of the General Court should be impeached, he be prosecuted in the Supreme Court of Appeals, from which it is to be inferred that others impeached were to be prosecuted in the General Court. The next State to refer to the matter was Pennsylvania, saying that the House of Representatives might "impeach state criminals," the Council to sit as judges. Then possibly Maryland may be thought to have met the need after a fashion by its provision that the House of Delegates should be the grand inquest of the State, with power to commit any person, for any crime, to the public jail, "there to remain till he be discharged by due course of law." Next came North Carolina, saying that the Governor and other officers offending against the State might be prosecuted on the impeachment of the General Assembly, i.e., the two Houses, or of any court of supreme jurisdiction in the State, leaving it to inference that the trial should proceed as in any case of any other alleged offense.

The New York Convention of the following year did, "in the name and by the authority of the good people of this State, ordain, determine, and declare" that a court should be instituted for the trial of impeachments, and the correction of errors, to consist of the President of the Senate, the Senators, Chancellor, and Judges of the Supreme Court. The impeaching

power was vested in "the representatives of the people in assembly," undoubtedly meaning thereby what is more often called the House. In Vermont, which imitated Pennsylvania with a single legislating body and a Council, the General Assembly was to impeach, the Governor with the Council to try. In South Carolina the House was to impeach, with trial by the Senators and such of the judges of the State as were not members of the House.

Massachusetts was the first to adopt the straight-out provision that the House should impeach, the Senate try. New Hampshire copied this four years later. It was to be the preference of the Federal Convention.

In that Convention, although there was some opposition to impeachments under any circumstances, the chief differences arose over whether they should be tried by the Senate or the courts. Madison and Pinckney objected to trial by the Senate. Gouverneur Morris thought no other tribunal could be trusted. Sherman believed it would be improper for the President to be tried by judges of the Supreme Court whom he might have appointed. Madison lost by a vote of two States to nine.

Hamilton in "The Federalist" (No. 65) took the view that the lower branch spoke for the people. "Where else than in the Senate," he asked, "could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confidence enough in its own situation, to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers?" He doubted if the Supreme Court would have the necessary fortitude, credit, or authority, and he thought a numerous court a necessity.

Undoubtedly there would now be general agreement that the Convention was wise in rejecting a proposal to suspend from their office persons impeached, until they be tried and acquitted. Although this was moved by such eminent members as John Rutledge and Gouverneur Morris, it was voted down, eight States to three.

With slight deviation, this is the impeaching method now prevailing throughout the Union. Of the original States South Carolina dropped the judges from the trial body in 1790. On the other hand New York has clung to its policy, in 1846 substituting the judges of the Court of Appeals for those of the



Supreme Court. Only one of the newer States, Nebraska, has sought novelty; there the impeachment is by the Senate and House in joint convention, with the trial by the Supreme Court. Oregon is unique in specifically forbidding impeachment. There incompetency, corruption, malfeasance, or delinquency in office may be tried in the same manner as criminal offenses, and judgment of dismissal from office may be given, with such further punishment as may have been prescribed by law.

The Constitutions vary a good deal in the matter of specifying and describing grounds for impeachment. Eight of the States do not attempt specification. With the others "misdemeanor" is the favorite word, appearing thirty-two times. Next rank "crimes" or "high crimes," with twenty-one uses. "Maladministration," "malfeasance," and "malpractice" taken together appear eighteen times, "corruption" and "corrupt conduct," eleven; "drunkenness," seven, with requirement added in four instances that it be habitual, and "intemperance," one, extending to liquors or narcotics. The specifications set forth by but a few States include bribery, extortion, favoritism, gross immorality, gross misconduct, moral turpitude, neglect of duty, negligence, nonfeasance, oppression, and treason. Alabama includes the taking of passes or of tickets at a discount by members of the Legislature or officers exercising judicial functions.

Virginia and Delaware started with a singular proviso. In those States the Governor was impeachable only when out of office. The absurdity of that commended itself to Delaware in 1792, to Virginia in 1830.

Up to the time of the Civil War only one Governor had been impeached in this country, and that was before there were Constitutions. It was in 1683 that Seth Sothel, having bought the rights of Lord Clarendon, arrived in North Carolina as Governor. The earlier historians tell us he presented every vice that can degrade man or disgrace his nature. During the six years that he misruled, the dark shades of his character were relieved by not a single ray of virtue. Profligate in his habits, licentious in his tastes, sordid and avaricious in his conduct, he marked his administration with every kind of extortion. He was impeached, imprisoned by the people, and sentenced to twelve months exile and to perpetual incapacity for the office of Governor. Nevertheless he returned to the other part of the

colony, South Carolina, where he afterward held the same office.<sup>1</sup> Recent writers, with that spirit of toleration and candor so marked in present-day historians, do not excoriate Sothel quite so thoroughly. They point out that bad though he may have been, there were creditable things in his administration not wholly consistent with complete depravity. Perhaps he was not so black as he was painted.

Since the beginning of the Civil War, a dozen or more Governors have been impeached, most of them Governors of Southern States in the reconstruction period. Three Governors have been impeached for improper use of State funds, one was acquitted, the other two were removed from office. The most conspicuous case has been that of Governor Sulzer of New York. Professor Holcombe's judgment is: "He was removed from office nominally on account of filing an incorrect return of his campaign expenses and suppressing evidence sought by a legislative committee appointed to investigate his alleged misconduct. He was really impeached because he had defied the political 'machine' to which he owed his nomination and election and had sought to make himself the leader of the 'organization.'"<sup>2</sup>

In at least two instances judges have been haled before a Legislature and put in jeopardy for having declared laws unconstitutional. In the famous case of *Trevett v Weeden*, decided in Rhode Island in 1786, so often cited in discussions of the origin of the power of the courts in this regard, the forms of impeachment do not appear to have been observed, but the effect was much the same, for after the five judges had on summons presented themselves and given their reasons, the Assembly resolved that the reasons were unsatisfactory. When the terms of the judges expired at the end of the year, the Assembly supplanted four of them.

The second case was one of genuine impeachment. A majority of the Supreme Court of Ohio, Judges Pease, Huntingdon, and Tod, held to be unconstitutional part of an act defining the duties of justices of the peace. Popular indignation rose to a high pitch. Pease and Tod were duly impeached, in 1808, but were acquitted. Huntingdon had been elected Governor and was not included in the proceedings.

<sup>1</sup> J. H. Wheeler, *Historical Sketches of North Carolina*, I, 31.

<sup>2</sup> *State Government in the United States*, 343.

The most noted impeachment cases in Congress, those of Justice Chase and President Johnson, have been distinctly political. Justice Chase was accused of having indulged in "highly indecent and extra-judicial reflections upon the United States Government," in the course of a charge to a Maryland grand jury, and with other improper conduct on the bench. The proceedings, instigated and managed by John Randolph, were partisan in origin and animus. Chase was acquitted. Johnson's trial excited the fiercest of political passions. He escaped by one vote.

By the way, the careless use of the words "impeach" and "impeachment" appears more often in connection with the Johnson case than any other, of course because that has been the most famous case. When high officials are charged, before a competent tribunal, with misconduct in office, they are "impeached," meaning thereby that they are formally accused. Johnson was "impeached," and thereafter upon trial was acquitted. The "impeachment" took place in the House, the trial and acquittal in the Senate.

Because of the burden on Congress of proceedings necessarily conducted with meticulous and prolonged formality, two proposals have been made for amending the Constitution. One would have let Congress provide by law for a different method of impeaching and trying civil officers other than the President, Vice President, and Justices of the Supreme Court. The second would have permitted twelve Senators to try all impeachments except those of the President, Vice President, and Chief Justice. The virtual impossibility of changing the Constitution in such points of detail has prevented action, but something along these lines might well be done if there is ever another Federal Convention, or if, as is more likely, some day a Commission made up of the most eminent statesmen in the land should be asked to recommend a group of minor constitutional changes clearly desirable that the machinery of our national government may function more smoothly.

In point of interpretation of the Federal Constitution the impeachment question most discussed has been that of scope. Is impeachment to be confined to acts forbidden by the Constitution or by statutes? The House Committee on the Judiciary, reporting on the English case March 25, 1926, said the better sustained and modern view is that the constitutional provision

applies not only to high crimes and misdemeanors as those words were understood at common law, but also to acts that are not defined as criminal and made subject to indictment, as well as those that affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests, for abuses or betrayal of trusts, for inexcusable neglect of duty, for the tyrannical abuse of power, for a breach of official duty by malfeasance or misfeasance; but no judge may be impeached for a wrong decision.

History does not teach that on the whole impeachment has wrought injustice. In few cases can it be said that trial of public officials by a political body has ended wrong. Yet the proceedings are almost open to suspicion of partisan prejudice and the worse phases of political influence. A better system is desirable, but nobody has yet conceived what it should be. There is no evidence that the courts would handle the matter more advantageously in the long run, and there is grave reason to fear it might do them harm. It is true that the present system illogically and unscientifically imposes judicial duties now and then on a branch of the government without special training or fitness to perform them, but instances are so rare and injuries have been so few that the practice has really little significance in its relation to the doctrine of the separation of powers.

#### APPOINTMENT

Colonial and provincial America developed no uniform and generally accepted method of selecting men to execute and apply the laws. In other words, officials and judges were chosen in various ways. It can, however, be safely said that for the greater part this was treated as an executive function. It is not needful here to examine in detail what took place in each of the colonies and provinces, but in view of problems that are very much alive to-day, some attention should be given to the development of methods for controlling chief executives.

For example, take Massachusetts. By the charter of that colony in 1629 the Governor, Deputy Governor, and Assistants were every month or oftener to hold "a Courte or Assemblée of themselves, for the better ordering and directing of their Affairs." In the Province charter of 1691 the "Assistants" became the "Councillors or Assistants," and the Court or Assembly became "a Councill for the ordering and directing the

*Affaires of our said Province* " In 1629 the Governor "and such of the Assistants and Freemen of the saide Company as shalbe present" were to elect such officers as they should think fit and requisite, the evident intent being that they should all be on a level in what was a joint action In 1691 this was distinctly changed by substituting a procedure for the nomination and appointment of officers by the Governor "with the advice and consent of the Councill or Assistants "

That phrase "advice and consent" was of ancient origin. It has been traced as far back as 759, then describing how a Northumbrian king was to proceed. So it was more than a thousand years old when John Adams wrote most of the Constitution for the new Commonwealth of Massachusetts Probably, however, he was not aware of its antiquity when he copied it from the Charter of 1691. Once at least in the new Constitution the "consent" part was omitted, for the Governor might pro-rogue "with advice of Council", and the description of that body says "there shall be a council for advising the Governor in the executive part of the government " Furthermore, the Governor shall and may, from time to time, "hold and keep a Council, for ordering and directing the affairs of the Commonwealth, according to the laws of the land " Nobody familiar with the happenings that led up to the quarrel over the Mandamus Councillors under the last of the royal Governors, can question that Adams and his contemporaries had a very definite purpose in using these terms and phrases In those days the words meant what they said

The first State Constitution, that of New Hampshire, putting everything in the hands of a bi-cameral Legislature, sheds no light on the subject. South Carolina, acting next, gives us information It created a Privy Council, which was "to advise the President" — as the Governor was at first called — "when required, but he shall not be bound to consult them, unless in cases after mentioned." The cases in question were those of minor appointments, which were to be made by the President "with the advice and consent of the Privy Council." By the first Constitution of Virginia the Governor was to exercise the executive powers of government "with the advice of a Council of State"; and that phrase, "with the advice," appears in connection with several of the executive powers specified, but "consent" is not used New Jersey came next with a Council

that in its legislative capacity served as the upper branch. The Governor and Council were to be the Court of Appeals, and they had the pardoning power, with no apparent discrimination between the Governor and the others. The Governor was to have the supreme executive power, with an indefinite direction or permission to consult the Council. Delaware had a Privy Council with few stipulated duties or powers. The President (Governor) "with the advice and consent of the Council" might "embody the militia," which presumably meant that he might call it out, as we should say, and he might "with the advice of the Privy Council" call the General Assembly together at a date before the time to which it stood adjourned. Pennsylvania vested the supreme executive power in a President and Council. Numerous executive acts were specified as to be performed by "the President with the Council," and the language indicates that they were to act as a body. Maryland had a Council, "with the advice and consent" or "by the advice" whereof the Governor was to perform various functions. As in Delaware he might embody the militia with the advice and consent of the Council. The specified powers of that body were deemed of importance enough for a provision that when the Council convened as a board for the transaction of business, the Governor, presiding, might vote when the Council was evenly divided. In North Carolina the Council was to "advise the Governor in the execution of his office," and the phrase "by and with the advice of the Council of State" appears in connection with executive powers. In Georgia the Legislature chose out of its own body an Executive Council, and the Governor was to exercise the executive powers of government "with the advice of the Executive Council." He might preside in it, except when it was taking into consideration and perusing the laws and ordinances offered to it by the House of Assembly, in which work it was in effect the upper branch of the Legislature.

It is evident that when the States began to organize, the makers of Constitutions were perplexed as to how executive officials and judges should be selected. Until the memory of the provincial Governors had dimmed, recourse to the legislative branch was natural, however inconsistent with the declarations for separation of powers. South Carolina acted first, putting the important appointments in the hands of the

Legislature, with election by ballot. This was continued in 1790, but with the provision that appointments other than those of the judges might be directed by law. Election of leading officials by the people began to appear in 1865, and now half a dozen are so chosen.

Virginia at the start gave the election of judges to the Legislature. Justices of the peace, however, were to be appointed by the Governor, "with the advice of the Privy Council," which was modified in 1830 so that in case of vacancies or increases in number the Governor should appoint on the recommendation of the respective county courts, with further change, in 1850, to election by the voters. In 1850 the choice of circuit court judges was entrusted to the electorate, but in 1870 it was returned to the General Assembly, where it remains. The first Constitution provided that the Secretary, Attorney General, and Treasurer should be chosen by the two Houses, and so it remained until 1902 when election by the people was substituted.

Through many years the most serious objection to the original Constitution of New Jersey was on the score of the blending of legislative and executive powers in the Legislature in the matter of appointments. It was averred that this gave the legislative branch complete control over the executive, for the Legislature could displace by dismissal, by the election of others, or by the refusal of pay. Said one critic. "The executive is but a mere puppet in the hands of the legislative." Charles R. Erdman, Jr., in "The New Jersey Constitution," speaks of the election period as an annual orgy. This was perhaps the chief cause for a new Constitution, in 1844, with a long Article on "Appointing Power and Tenure of Office," which turned over to the Governor the more important part of the work, subject to "the advice and consent of the Senate." County officials and justices of the peace were to be elected by the people.

In Delaware at the outset the President and General Assembly were to appoint the justices, the President and Privy Council were to appoint various enumerated officials, the justices of the peace were left to the Assembly. In 1792 nearly all the appointing power was turned over to the Governor, without restriction, but in 1897 its use was made subject to the consent of a majority of all members elected to the Senate. From 1792 to 1897 the Treasurer was chosen by the House, "with the

concurrence of the Senate"; then election by the people was substituted, as also was provided for three other State officials.

Pennsylvania began by giving the appointing power to the President, with the Council, turning it over to the Governor without restrictions in 1790 when the Council disappeared, but the State Treasurer was to be elected by the Legislature. In 1838 the appointment of judges and judicial officers by the Governor was made subject to confirmation by the Senate, and in 1850 popular election of judges was substituted. In Maryland the Treasurers (there were two of them) and the Commissioners of the Loan Office were to be appointed by the House of Delegates, but otherwise the executive officials and the judges, with unimportant exceptions, were to be named by the Governor, "with the advice and consent of the Council." In 1837 the Senate was substituted for the Council. In 1851 came popular election of the judges and higher officials. The Legislature of North Carolina elected the judges and higher officials from 1776 to 1868, when the people took over the task. The only power given to the Governor in this connection in 1776 was that of filling a vacancy by temporary appointment, "with the advice of the Council of State." Likewise in Georgia the Governor, "with the advice of the Executive Council," was to fill intermediate vacancies. The early Constitutions in that State provided for election of the Governor by the Legislature, and when that of 1798 said the judges of the Superior Court were to be "elected," it may have meant by the Legislature. Those of the inferior courts were clearly specified as "to be appointed by the General Assembly," and so with the State's Attorney and solicitors. Popular election of justices of the inferior courts came in 1812.

New York began with an odd arrangement. The Assembly was to name one of the Senators from each of the great districts, and the four should do the appointing not otherwise provided for specifically in the Constitution. With them should sit the President (or acting President), who was to "have a casting voice, but no other vote." Hamilton, in No. 77 of "The Federalist," made severe strictures on the workings of this device, based chiefly on their secrecy. It was not known to what extent the Governor exercised the right of nomination that he claimed to be his. "While an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost." Two out of the incon-



siderable number of four men can too often be managed without much difficulty. It is frequently not impossible to get rid of opposition by regulating the times of meeting in such a manner as to render the attendance of members of "an uncomplying character" inconvenient "From whatever cause it may proceed, a great number of very improper appointments are from time to time made"

Also unique was the device in the New York Constitution of 1821 for choosing the Secretary of State, Comptroller, Treasurer, Attorney-General, Surveyor-General, and Commissary-General. The two branches were to make a nomination for each of these officers; if on meeting together it was found that they had nominated the same man, that ended it; otherwise they were to elect by joint ballot. The Governor was to nominate the judges, and "with the consent of the Senate" to appoint them. With 1846 came their popular election.

Massachusetts began by having all judicial officers appointed by the Governor, "by and with the advice and consent of the Council," but has since (in 1855) turned over to the electorate the choice of the Attorney-General, Sheriffs, and Registers of Probate. The Secretary of State and the State Treasurer were elected by the General Court, the two branches sitting jointly, until 1855, when these officers too went on the election ballot. Vermont, the only other State to frame a Constitution before that of the nation, had the Treasurer elected by the people and other "officers" named by the Governor "with the Council." There was no specification about the appointment of the higher judges in the Constitution of 1777, though the judges of the inferior courts were to be elected by the people. In 1786 it was provided that the General Assembly, "in conjunction with the Council," should elect judges of the Supreme and the several county and probate courts, sheriffs, and justices of the peace.

The State Constitutions as they now stand show great diversity in the methods of selecting public officers and the share of the legislative branch therein. About thirty of them require the Governor's appointments of certain specified officers to be confirmed by the Senate. A dozen or more require election by the Legislature, but fortunately the positions to be filled in this way are few. On the other hand four of the Constitutions, those of Ohio, Illinois, Nebraska, and West Virginia, are wise enough to declare that no officers shall be elected or appointed

by the Legislature, Ohio excepting as otherwise provided in the Constitution. Texas is unique in stipulating that no member of either House shall vote for any other member for any office whatever that may be filled by vote of the Legislature, except in such cases as are in the Constitution provided.

It will be seen that when the Federal Convention assembled, in 1787, the States had come to no unity of judgment as to how judges and officials may best be chosen in a republic. The differences of opinion showed themselves repeatedly in the Convention and were harmonized but slowly. Of the two plans submitted at the outset as a basis for discussion, that of Randolph proposed that the judges should be chosen by "the national legislature", that of Pinckney provided for choice of the Treasurer by the legislature, of ambassadors and judges of the Supreme Court by the Senate, of all other officers by the executive "with the consent of the Senate."

The controversy that followed was a matching of dangers rather than merits. Wilson of Pennsylvania disclosed the reason for fearing the legislative branch when he said that this business, it was notorious, was the most corruptly managed of any that had been committed to legislative bodies. "Intrigue, partiality, and concealment were the necessary consequence of appointments by numerous bodies." Gouverneur Morris declared that such appointments are always worse than those made by single irresponsible individuals, or by the people at large. Madison, objecting to appointment of the judiciary by the whole legislature, said many of the members thereof were incompetent judges of the requisite qualifications. They were too much influenced by their partialities. The candidate who was present, who had displayed a talent for business in the legislative field, who had, perhaps, assisted ignorant members in business of their own or of their constituents, or used other winning means, would, without any of the essential qualifications for an expositor of the laws, prevail over a competitor not having these recommendations, but possessed of every necessary accomplishment. He proposed appointment by the Senate, whereupon Sherman and Pinckney withdrew their motion that the whole legislature should appoint, and Madison's proposal prevailed, nobody objecting.

This was not by any means to end the matter. Along came Patterson of New Jersey with still another plan for the new

Constitution, one feature of which would have put the appointment not only of judges but also of all federal officials wholly in the hands of the executive. This was in the face of what Franklin and others had been saying but ten days before Franklin had expressed the wish that other modes of choice of judges than by either legislature or executive might be suggested. He then, in what Madison describes as a brief and entertaining manner, related a Scotch mode, in which the nomination proceeded from the lawyers, who always selected the ablest of their profession, in order to get rid of him, and share his practice among themselves.

In connection with the veto problem Colonel Mason had disclosed his grounds for fear of vesting the executive powers in a single person. The executive, he said, may refuse assent to necessary measures, till new appointments shall be referred to him; and, having by degrees engrossed all these into his own hands, the American executive, like the British, will, by bribery and influence, save himself the trouble and odium of exerting his negative afterward.

When Hamilton broke his silence with a long speech advocating a strong central government, he submitted a plan of which one feature was unrestricted power of the chief executive to appoint the heads of the departments of war, finance, and foreign affairs, with other appointments subject to the approbation or rejection of the Senate. Just a month later the matter came up for specific discussion. Wilson moved that the judges be appointed by the executive instead of by the second branch, Gouverneur Morris seconded the motion, and it was supported by Gorham, but only Massachusetts and Pennsylvania voted for it. Then Gorham urged appointment by the executive with the advice and consent of the second branch. Madison quotes him as saying this would be in the mode prescribed by the Constitution of Massachusetts, which was not quite exact, for in Massachusetts appointments were subject to confirmation by the Governor's Council. However, at that time the Councillors were chosen out of the membership of the Senate, and if Gorham was quoted correctly, perhaps he did not mean to go beyond the principle of the thing. Maryland and Virginia joined with Massachusetts and Pennsylvania in support of Gorham's motion, but the vote was a tie, the Georgia representation being absent.

When the matter was reached again, Madison renewed his suggestion that appointments of judges by the executive should stand unless disagreed to by two thirds of the second branch, which, it will be observed, is not the same thing as approval by two thirds. Gerry strongly objected in this particular and Madison yielded the point, changing his motion so that a majority might reject Pinckney and Colonel Mason stood out against the proposal, and it was defeated for the time, by six States to three, and when the Committee on Detail reported its full draft, judges and ambassadors were to be appointed by the Senate, a treasurer by "the legislature," and other officers by the President. In the course of considering this draft section by section Read of Delaware moved to strike out the clause about the treasurer. The legislature was an improper body for appointments, he said, those of the State legislatures were a proof of it, the executive, being responsible, would make a good choice. The motion was defeated by six States to four, but better judgment prevailed a month later when General Pinckney told the Convention that the consequence of appointment by joint ballot in South Carolina had been that bad appointments were made, and the Legislature would not listen to the faults of their own officer. In spite of the opposition of Gorham, King, and Sherman, the clause was stricken out, by eight States to three.

Next the question came up in connection with the proposal to provide a council for the President. Dickinson urged that what he called "the great appointments" should be made by the legislature, in which case they might properly be consulted by the executive, but not if made by the executive himself. However, when Gouverneur Morris, seconded by Pinckney, presented a plan for what he called a Council of State and we call a Cabinet, its members were to be appointed by the President, without mention of confirmation. This plan was referred to the Committee on Detail, where it seems to have died.

When appointments came to the front again, Dickinson pressed his idea of allowing them to be referred by the general legislature to the executives of the several States, a notion that would now be looked upon as absurd, but it actually got the support of the delegations from Connecticut, Virginia, and Georgia, and half that of Maryland. Fortunately six States voted it down.

Meanwhile the Committee on Detail was busy, and as often happens with like committees in conventions, was using its power to advantage. Doubtless the level-headed men of the Convention had a share in its councils. Anyhow it was making sundry changes without recorded instructions, and among them was recasting of the provisions about appointment so that ambassadors, other public ministers, judges of the Supreme Court, and all other officers should be named by the President, subject to confirmation by the Senate, unless otherwise provided in the Constitution. To this a few objections were raised, but in vain. Mason tried to resurrect his plan for a Council, but though supported by Franklin, Wilson, Dickinson, and Madison, the Convention stood by its Committee on Detail. It had, however, put consuls in the list of presidential appointees. The final draft added that the Congress might by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments, and that the President should have power to fill vacancies happening during the recess of the Senate, by granting commissions which should expire at the end of their next session.

As the Constitution stands, the order of the words in this particular has significance. The President "shall nominate, and, by and with the advice and consent of the Senate, shall appoint." Clearly he is to take the initiative. "Advice" comes afterward. Compare the language with that of the Massachusetts Constitution adopted seven years before, by which the specified officers were to be "nominated and appointed by the Governor, by and with the advice and consent of the Council." That might be interpreted as meaning, and possibly was meant to mean, that the Council should be consulted in advance of nomination. Such report as we have of the debates in the Federal Convention throws no light on the matter, but something may be inferred from the fact that the draft plans which were the bases for deliberation did not copy the Massachusetts language. Pinckney's plan would have the President "nominate, and with the consent of the Senate, appoint." Randolph proposed that the national judiciary be "chosen by the national legislature" and said nothing about other officials. Later, Graham's report would have empowered the President "to appoint to offices in cases not otherwise provided for," apparently with-

out restriction; the judges, however, were "to be appointed by the second branch of the national legislature" The New Jersey plan, presented by Patterson, contemplated an executive composed of several persons, who were "to appoint all federal officers not otherwise provided for."

Nothing further on the subject appears until the report of the Committee on Detail September 4, which embodies the language as it now stands.

This was promptly construed by Hamilton in "The Federalist" (No. 66) as definitely limiting the share of the Senate. "There will, of course," he said, "be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another, but they cannot themselves *choose* — they can only ratify or reject the choice of the President." This was the view taken by Washington, who had occasion (August 8, 1789) to make a formal statement to a committee of the Senate, appointed to confer with him on the mode of communication between the President and the Senate respecting treaties and nomination. His idea was that as nominations point to a single object, unconnected in its nature with any other object, they had best be made by written messages. "In this case the acts of the President and the acts of the Senate will stand upon clear, distinct, and responsible ground."

For nearly a century no important question of principle arose in this field. Then, in 1877, came controversy over the right of the President to name his own Cabinet without interference by the Senate. It had been hitherto assumed that in the matter of the Secretaries the consent of the Senate was wholly perfunctory. Possibly because several Senators wished to make trouble for President Hayes for not consulting them in making his selections, the whole list was referred to committees for examination and report. This aroused strong protest throughout the country, resulting in hasty and favorable action on all the nominations. Almost half a century passed before the issue was raised again, this time with less fortunate result. This time, in 1925, the Senate rejected President Coolidge's nomination of an Attorney-General. The President sent in the nomination again, expressing the hope that "the unbroken practice of three generations of permitting the President to choose his own Cabinet will not now be changed." The session was soon to end and no action followed before adjournment.

The nominee declined a recess appointment, and when another name was submitted at the next session, it was speedily approved.

A new theory was coming to the front. Some Senators, particularly those of a "radical" bent of mind, were beginning to think it their duty to carry much farther than ever before the test of qualification. They held it to be their right and their duty to use past conduct and action as an indication of what is likely to be or even may be future exercise of judgment. Of course within limits this is sound. The question is one of degree. The thing to be criticized is that in recent instances there has been too much ground for fearing that prejudice in the matter of what are in fact reasonable and legitimate differences of opinion in respect to social problems, has been allowed to outweigh considerations of mental integrity, intellectual honesty, as well as those of experience and capacity.

It is particularly unfortunate that prejudice related to social problems should be coming to play so large a part in the Senatorial consideration of judicial appointments. To base conclusions as to an appointee's fitness to be a judge upon his bent of mind as shown by an isolated decision of his when presiding in some lower court, may be grossly unfair and at best is finical. If the extreme to which that sort of thing has been carried of late should become an established practice, there may well be doubt as to whether the fathers did wisely in giving the Senate any part at all in the executive function of choosing men to determine what is the law and men to carry the law into effect.

As a matter of fact the Administration does better work than the Senate could or would do. Through the Attorney-General inquiry is made in every direction promising help. Where locality is involved, bar associations, leading lawyers, members of Congress, and others who may be expected to have personal acquaintance are consulted. Trouble comes only when the men who are to confirm the appointment, the Senators, give the "advice" that they infer from the Constitution to be their right. Not always has that "advice" been unprejudiced. That is true in the case of all kinds of nominations. It is an unfortunate corollary of the excellent theory that Senators are best informed about the citizens of their own States. Out of this has come the notion that they should do more than advise, that they should dictate. There is every reason why the Executive should

consult, none why he should obey. Usually this is recognized, but now and then a Senator carries the spoils system to the extreme and demands an appointment that he thinks will accrue to his personal advantage. Happily with the gradual acceptance of the spirit of the merit system, the contests between President and Senate that have disfigured our political history are becoming fewer.

The requirement that the President shall appoint postmasters, revenue collectors, marshals, and other United States officers (judges excepted) has not worked to universal acceptance. More than twoscore amendments to the Constitution have been laid before Congress looking to choice by election where the law stipulates that the official shall live within the State or district involved. That remedy would be unfortunate. Already we elect far too many administrative officials. It would, however, be advantageous if we could find some way of relieving Presidents and Senators of the burden now imposed on them in the case of many minor officials.

The technique of confirmation has produced much dispute in both Federal and State cases. It is not a matter of enough importance to call for discussion *in extenso* here, but attention may be called to the exhaustive treatment of the subject in the George Otis Smith case by Associate Justice Gordon of the District of Columbia Supreme Court, December 5, 1931, and by Mr. Justice Brandeis of the Supreme Court of the United States, May 2, 1932. After the Senate had notified President Hoover of its confirmation of Smith's appointment as a member and chairman of the Federal Power commission, it sought to reconsider the matter under its rules, which permitted that to be done on motion made on either of the next two days of actual executive session of the Senate after the day of confirmation. The nub of the question was whether the Senate had any power left after the President had completed the appointment. Was the President bound in any way by the rules of the Senate? If not, Smith could be ousted only by removal. Both courts held that the President's action was final. This finding was equally logical and fortunate. Otherwise the Senate might expose every appointment to reconsideration indefinitely by the simple expedient of changing its rules so that a motion to reconsider would have perpetual life. This would correspond to what is said to be the practice of the Socialists, whereunder



any of their number elected to office signs a resignation to be held by the central authority and produced upon occasion for discipline. It would be hard to conceive anything more dangerous to our administrative structure.

The problem of whether election of officials is primarily a legislative, an executive, or a judicial function has much vexed the courts. Anyone wishing to review the conflict of argument might well start with the case of *Sinking Fund Commissioners, etc., v. George*, 104 Ky. 260 (1898). The Legislature, passing an act to create a Board of Penitentiary Commissioners, had provided they should be elected by the General Assembly. In a long and learned opinion, delivered by Judge Thomas H. Paynter, the majority held this was within the legislative power. In an equally learned opinion Judge George DuRelle held to the contrary. Three years later the same court, with complexion slightly changed, reversed itself, with majority and minority opinions again long and learned. Abundant citation to other cases involving the problem may there be found.

Judge DuRelle in his dissenting opinion called attention to the fact that the Federal Congress had never created and at the same time filled an office, and had never attempted it but once. Doubtless he was referring to the bill passed by Congress in 1884 to appoint Fitz John Porter, late a Major General of Volunteers, as Colonel in the regular army. President Arthur vetoed the bill partly on the ground it would create a new office that could be filled only by Porter's appointment. The President held that Congress had no such power under the Constitution.

Study of all the cases may invite the conclusion that at the will of the legislative branch where there is no constitutional barrier the appointing power may be given to the legislative, the executive, or the judicial branch, or to an electorate. In short, it is not treated as a matter of political theory, but of practical expediency. And what good would come from treating it otherwise?

### REMOVAL

It is remarkable and regrettable that the framers of the Federal Constitution should have overlooked the matter of removal from office. Unless something has escaped my notice, there are but two references to the subject in the debates as

recorded by Madison. The proposal of Gouverneur Morris for a "council of state," in effect what we know as the Cabinet, specified that its members should be "appointed by the President during pleasure," but the main proposal failing, the subordinate proposal went with it. On the 27th of August, when the article relating to the judges came up, Dickinson moved to provide "that they may be removed by the executive on the application by the Senate and House of Representatives." Only Connecticut voted for this, but the same thing was in effect accomplished by the impeachment provisions.

Alexander Hamilton seems to have taken it for granted that removals would have to be approved by the Senate, for he said in "The Federalist" (No. 77). "The consent of that body would be necessary to displace as well as appoint."

The question vexed the very first Congress by reason of a provision in a bill establishing one of the Departments that its head should be "removable by the President." It was long and earnestly discussed. Madison, who ought to have known better what the framers of the Constitution intended than any other man in the land, basing his argument on the vesting of executive power in the President, did not see how the laws could be faithfully executed if an officer when once appointed did not depend upon the President for his official existence. Fisher Ames and Goodhue of Massachusetts argued to like effect, and were joined by other of the clear thinkers of the new Congress. Nevertheless, the opposition in the House was so strong that an amendment taking the sting out of the proposal was adopted, the requirement being changed to one for certain things to be done in the matter of books and papers if the President should remove the Secretary. In the Senate opinion was equally divided and Vice-President John Adams had to break a tie by voting in favor of the measure as the House had amended it.

The problem next came to the front when Andrew Jackson removed Duane, Secretary of the Treasury, because Duane refused to withdraw all public funds from the United States Bank. When the President sent in the nomination of Taney to succeed Duane, it gave Webster, Clay, and Calhoun their chance to begin a memorable attack on the Administration. For three months the Senate debated the resolutions of condemnation that then were adopted. In the course of the debate the Senate asked the President to give it information as to why

Duane had been removed. The President in refusing declared that he possessed the exclusive power of removal.

Daniel Webster, speaking on a bill that had been introduced as a result of the Duane controversy, said he thought the power of removal went along with the power to appoint, and should have been regarded as part of it, and exercised by the same hands. Consequently he thought erroneous the decision of 1789, but as it had been recognized by practice and recognized by subsequent laws, it would better be acted upon accordingly for the present, without admitting that Congress might not thereafter reverse the decision.

A generation later another hostile Congress took issue with the President likewise, but this time over a bill that had passed, the Tenure of Office Act, providing in substance that various civil officers should remain in office until the appointment of successors had been consented to by the Senate. President Johnson sent back the bill with an admirable veto message telling the history of the question and defending the constitutional interpretation that had thus far prevailed, but by a strictly partisan vote the bill was passed over the veto. Johnson's refusal to enforce the Act, and his attempt to remove Secretary Stanton against the wish of the Senate, led to his impeachment. Afterward the Act was repealed piecemeal.

When Cleveland came in, there remained a requirement that within thirty days after the convening of Congress following a recess in the course of which a removal had been made, the President should send in the name of a successor. The President complying with this, the Senate undertook to say it would not confirm until it had received from the Attorney General, upon whom the request had in form been made, the President's reasons for the removal. The controversy ended upon the discovery that the term of office of the man removed had been completed before the request of the Senate had been made. In Mr Cleveland's second term, May 26, 1893, he removed a District Attorney. The case was taken into the Court of Claims, and thence to the Supreme Court, which held that the repeal of the Tenure of Office statute conceded again to the President the power of removal if it had been taken from him by the original Act.<sup>1</sup>

Next of importance came the veto of the Budget Bill by Pres-

<sup>1</sup> *Parsons v United States*, 167 U S 324 (1896)

ident Wilson, June 4, 1920, because it provided that the Comptroller General and the Assistant Comptroller General, who were to be appointed by the President with the advice and consent of the Senate, might be removed at any time by a concurrent resolution of Congress, for certain specified causes and for no other reason. The veto was sustained, but soon after Mr. Harding became President the bill was again passed and then signed. This time, however, it was provided that the removal should be by joint resolution. The distinction is that all joint resolutions except in the matter of constitutional amendment go to the President like bills, but concurrent resolutions do not.

The Act said that the officials in question shall not be removed except for the causes specified, "and in no other manner except by impeachment." This would seem to leave the door open, or at any rate ajar, for some President to raise the question of constitutionality on the ground that he may not be restricted in any way whatever. If the question ever reaches the Supreme Court, it will presumably be argued in behalf of Congress that in creating the General Accounting Office, of which the Comptroller General was to be the head, the Act said he should be "independent of the executive departments," in other words an agency of the legislative branch and therefore subject to its sole control. If the Comptroller General is the agent of Congress, responsible directly and only to Congress, then there may be ground for holding that it can remove him without regard to powers constitutionally lodged in the executive branch. Whether that would hold also in the case of officers to whom legislative powers of some sort have been granted, as in the case of the Interstate Commerce Commission, is a further question of interest. Under somewhat like conditions the legislative power over certain State officers has been sustained in Pennsylvania, but the question has not as yet reached the Federal Supreme Court.

The unrestricted power of the President to remove executive officials from offices filled by Presidential appointment received at last definite adjudication (save for the possibility of reversal) in the case of *Myers v. United States*, 272 U. S. 52 (1926). President Wilson had removed Myers, a postmaster, without the consent of the Senate, although the Act creating the office that Myers held had required such consent for the removal to be valid. The case was ably argued by two of the most eminent

lawyers in the country, Senator George Wharton Pepper, speaking as *amicus curiae*, for the Senate, and Solicitor General James M. Beck for the President. By a six to three decision the Court supported the President, thus probably ending a controversy that had begun when Congress began, one hundred and thirty-seven years before.

The conclusion of the Court, while of course reached purely as a matter of constitutional interpretation, to my mind accords with expediency. In the selection of appointees a Chief Executive must perforce rely largely on the knowledge and judgment of others, for he can rarely have personal acquaintance with candidates. Senators are more likely to know and presumedly in better position to judge. To join the Senate with the President is therefore defensible, even though at times the weaknesses of human nature pervert the result. When removal is the question, the situation is quite different. Then the Executive knows or can easily learn all the facts. He ought to exercise disciplinary authority alone, unhampered.

The friction accompanying the controversy over the question has naturally led to proposals for amending the Federal Constitution in this particular. Nearly a score of amendments have been introduced, looking to restricting the power of the President. Whether proposing to make definite a share of the power by the Senate, or to give the whole of it to one or both Houses, all have failed to get serious attention. No change is likely unless some day through a convention or otherwise there comes opportunity to alter minor details of the Constitution.

In nine of the States the Governor has by himself power of removal, usually for causes specified in the Constitution, such as incompetency, neglect of duty, or malfeasance in office. Florida requires the consent of the Senate. Pennsylvania gives him the power of removing elected officers, with specified exceptions, on address of the Legislature, and three other States require address of the Legislature, with varying conditions. Indiana, Louisiana, and Virginia entrust removal to the Legislature, likewise under varying conditions. In seven of the States conviction by the court results in removal, still again under varying conditions. In about a score of the States removal is to be provided for by law.

Where the constitutions are not clear in giving or placing the power, the matter has reached the courts, where the weight of

opinion seems to have been that removal is not an implicit power of a Chief Executive. Some attempt has been made to declare it a judicial power, forfeiture of office to be declared by a court upon proof of malfeasance or other cause seeming sufficient to the judicial mind. The leading case on the subject is that of *Field v The People*, 3 Ill 79 (1839), which decided that an Illinois Governor may not remove a Secretary of State. There you may find the views of the Chief Justice and of a dissenting Justice set forth to the extent of more than a hundred pages

### TREATIES

The Constitution submitted to the States by the Convention of 1787 provided that the President should have power, by and with the advice of the Senate, to make treaties. This at once led many critics to say that the House ought to have a share. That and the further question of whether in fact the Constitution, by other provisions, does give the House a share have led to the chief discussions of the treaty-making power. The first in the House itself produced wrangling and strife that have rarely if ever been surpassed in our political battles. Trouble reached its height when the House voted to request the President to lay before it a copy of the instructions, with all the correspondence and other documents, relating to the mission of John Jay to England as envoy extraordinary for the purpose of making with that country a treaty which should ensure peace. Washington took a week to consider and then sent to the House a message concluding as follows

"As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty, as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light, and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request "

GO WASHINGTON

In retort the House passed two resolutions — one disclaiming the wish to have "any agency in making treaties," and the

other insisting that when the House called on the President for information, it was not incumbent on them to state the purpose for which it was wanted.

Next followed fourteen days of dispute over whether the House would enact the legislation necessary to give effect to the treaty with England and three other treaties. The debate, with that which had preceded, covered nearly every constitutional aspect of the relation of the House to treaties that ingenuity has so far discovered. On the pending question the vote in Committee of the Whole was a tie, and the resolution was sent to the House sitting as such by only the casting vote of the Chairman of the Committee. In the House it prevailed, fifty-one to forty-eight. The speech of Fisher Ames is believed to have won the battle for the Federalists.

Ninety years later the question came to the surface again because of a series of commercial treaties that would restrict the power of Congress to lay duties on certain merchandise, and after the World War the delay of the Senate in ratifying the treaty of Versailles, revived discussion, but with no effect. Intermittently the controversy has been carried on outside Congress ever since the Jay treaty. If you would study the arguments exhaustively, read the opposing views as set forth by Henry St. George Tucker in "Limitations of the Treaty-making Power" and Charles Henry Butler in "The Treaty-making Power under the Constitution of the United States"; also speeches in the House by Mr. Tucker, looked upon by his colleagues not only as an authority in matters constitutional but also as one of the most respected and beloved members, and by Theodore E. Burton, who during long service in House and Senate disproved the allegation that in our time there have been in Congress no such statesmen as of old.<sup>1</sup> Friendship past or present with all three of these gentlemen disinclines me to attempt the rôle of referee and the controversy is so largely academic that only brief conclusion is here desirable. The fact is that whether right or wrong, the House has the whip-hand by reason of its exclusive power to start appropriations, so that whenever it wants to, it can nullify any treaty that requires the spending of money in order to give it effect. This has made the real question one of morals rather than of mechanics.

Reflect, then, upon whether the House is under any ethical

<sup>1</sup> *Congressional Record*, May 17 and 20, 1922

obligation to approve whatever has been agreed upon by the President and the Senate. No matter what your answer and regardless of what the House may hereafter do, the fact is that so far the House has taken but one view of the matter. Mr. Butler has said no treaty has ever been made and ratified, by which the faith of the Union has been pledged, that the House has not fully carried out by enacting the necessary legislation so far as appropriations and modifications of existing law have been concerned, indeed, instances might be cited in which members of the House of Representatives have waived party and personal feelings so that there could be no question as to the good faith of the United States in carrying out treaty stipulations. To be sure, Representative Samuel W. McCall, writing in "The Business of Congress" (ch. I) said that more than one treaty has lapsed because of necessary legislation, but avoiding the labor necessary to check up the facts, it may suffice to say that certainly in general the House has acquiesced.

Perhaps Mr. McCall had in mind treaties nullified at some considerable time after they were made. Congress has repealed treaties and the courts have held it possessed that power, as for instance in the *Head Money* cases, 112 U. S. 580 (1884).

The Supreme Court has several times said that the authority to enter into treaties does not extend so far as to authorize what the Constitution forbids. One of the objections to the Roosevelt arbitration treaties of 1904 was that they would delegate the treaty-making power to the President. The forms or powers of the departments of government may not be changed by treaties. It has not come to my knowledge that a treaty of the United States has ever been declared unconstitutional. Once the issue was raised, in the United States District Court, in California, over the right to compel a consul of France to produce a document in his possession.<sup>1</sup> The Sixth Amendment to the Constitution says that the accused in a criminal prosecution shall have the right to have compulsory process for obtaining witnesses in his favor. A treaty with France had said that consuls should never be compelled to appear in court as witnesses. The court held for the treaty as against the Constitution, partly because the constitutional provision should in such a matter yield to the law of nations, and partly because the First Congress restricted (April 30, 1794) "process to such as is

<sup>1</sup> *In re* Dillon, 7 Sawyer 561 (1864)



usually granted." The syllabus in the Dillon case reads to the effect that the constitutional provision does not authorize the issuing of the process desired to consuls who, by express treaty, are not amenable to the process of the courts, but the case went off on another point. It is probable that the Supreme Court would go far to sustain the constitutionality of a treaty. The exercise of "a power which must belong to and reside somewhere in every civilized government" must be sustained if possible.

Question has arisen chiefly through conflicting provisions within the Constitution itself. For example, while it says that treaties shall be "the supreme law of the land," and therefore to that extent puts the lawmaking power in the hands of the President and Senate, it also says that "all bills for raising revenue shall originate in the House of Representatives" and that "the Congress shall have power to levy and collect taxes, duties, imports and excises, to pay the debts," etc., "Congress" of course including both House and Senate. Can the President and Senate make a treaty affecting the revenue? Able lawyers have differed. Those of the House have kept it steadfastly against interference with its prerogatives. Those of the Senate have not put the issue to the test.

Naturally the long and sharp contest in our Senate over the Treaty of Versailles after the World War revived discussion of our treaty-making methods. Among the proposals of change was, for instance, that of Samuel W. McCall, who had been a member of the House from Massachusetts for a score of years and then Governor of that State. He suggested taking the power of approving treaties from the Senate and giving it to the House.<sup>1</sup> Were the issue paramount, the people in their election of Representatives could give their judgment. Two objections present themselves to such a program. It is hard to imagine that such an issue would ever be paramount, and equally hard to believe that an electorate could intelligently and wisely pass judgment on that sort of an issue. Our present method may at times have disappointed. Certainly it has failed to secure two things the fathers expected — secrecy and dispatch. Yet it is far from clear that any other method yet suggested would work better.

The declaring of war was placed among the functions of our

<sup>1</sup> "Again the Senate," *Atlantic Monthly*, September, 1920

legislative branch by the Federal Convention of 1787. Charles Pinckney's plan, submitted as a basis for discussion, gave it to the Senate, and so did Hamilton's draft of his views. Without discussion in the Convention, as far as Madison's journal discloses, the Committee on Detail gave the power to "the legislature" (for which term "the Congress" was substituted in the final draft), and said it should "make" war. Madison and Gerry preferred "declare," as "leaving to the executive the power to repel sudden attacks" Mason also preferred "declare" Pinckney persisted in his view that the Senate would be the best depositary, being more acquainted with foreign affairs, and more capable of proper resolutions, and when "declare" had been substituted for "make" by a vote of eight States to one, he moved to strike out the whole clause, which was disagreed to without call of States Butler, seconded by Gerry, moved to give the Legislature the power of peace, as they were to have that of war, but this was unanimously negatived and our Constitution is silent on that phase of the matter.

In England the King, acting on the advice of his Ministers, makes war Parliament has no direct way of starting or stopping a war, but it may take a hand by address to the Crown or by resolutions of condemnation, and the House of Commons may refuse to vote supplies. Inasmuch, however, as the Cabinet is in effect a committee of the House of Commons, and the dominating committee until defeated, war can be said to be at least in part a function of the British legislative branch.

## CHAPTER V

### THE VETO POWER

"Veto" is the Latin word meaning "I forbid." Two hundred years after the founding of Rome the plebeians, oppressed by the patricians, seceded to the height three miles out of the city ever afterward known as Mons Sacer. They refused to return until they were solemnly assured that they might elect Tribunes, to whom was committed the protection of their rights. These officials could forbid the enforcement of a consul's command infringing the liberties of the citizens, the execution of any sentence, the levying of any taxes, the enlisting of any troops, in short, almost anything administrative. In the course of time they became able to forbid even decrees of the Senate or indeed the discussion of any question. Originally designed to protect the people, the power was in the end disastrous; it came to be employed for oppressing the lower orders, excluding them from the councils of the nation, and making them the tools of demagogues.

At least occasionally the tribunes used the word "veto," but manifestly with a purpose and scope quite different from that which it now has. There was no inheritance of the Roman idea in the act of the Norman Kings to which we trace the institution of to-day. In the early years of Parliament the King granted its petitions by framing and signing a law, or he denied them. After Parliament took over the framing of laws, it was still the duty of the King to approve or disapprove. The formal act of approval became, as it still is, purely perfunctory. For a long time it did not even seriously embarrass the monarch. As Macaulay observed,<sup>1</sup> nothing could be more natural than that a King should not think it worth while to refuse his assent to a statute with which he could dispense whenever he saw fit.

Disapproval was of more consequence. Queen Elizabeth on one occasion refused her assent to forty-eight bills. It was one of the royal powers contested by the Long Parliament. In 1642 the Long Parliament asserted the right to enact laws without the approval of Charles I. When he refused to approve a bill that

<sup>1</sup> *History of England*, ch. xviii.

would have deprived him of control of the militia, they enacted it as an ordinance, which the Royalists declared to be political heresy. The lack of royal assent was one of the reasons for formal declaration, after Charles II had been restored to the throne, that all the laws enacted under the Commonwealth were null and void.

William III, having solemnly renounced the dispensing power by the Bill of Rights, found in the veto his only chance to assert himself. He vetoed more bills than all the Stuarts put together. At the same time, however, came development of the responsible Ministry idea, with which the veto was inconsistent, for a King could not well veto a bill his ministers had put through Parliament. Queen Anne, in 1707, rejecting a bill for settling the militia in Scotland, exercised the power for what will probably have been the last time in England. George III affirmed the right, but did not exercise it. Late in his reign he told Lord Eldon that once when Thurlow brought bills to him, after reading several Thurlow stopped and said, "It is all damned nonsense trying to make you understand them, and you had better accept them at once." That view of it the King seems to have accepted perforce.

With the planting of colonies in America came two kinds of executive interference with legislation, one by the King through his administrative agencies in England, the other by his Governors acting within the colonies themselves. The first was not really the exercise of a veto power, but of a repealing power. Manifestly the months required for intercommunication made it out of the question to require that laws should not take effect until approved by the Crown. Of necessity they were permitted to be in effect until the Crown disallowed them, in case it saw fit so to do. Evasion was easy. The legislatures would proceed by way of "Resolves," which they held need not be submitted to the Board of Trade; or if the charter exempted laws not to be in force beyond a specified period, say five years, the canny lawmakers would make the life of a law perhaps four years and a half, then re-enacting it for a like term; or they would re-enact a disallowed law under a new title. The disputes over these things helped to ripen revolt.

While by reason of charter differences precise generalization is impossible, it may be said that in general the right of Governors to prevent the birth of laws and the right of the Crown to

put them to death became the normal thing after colonial America became provincial America. To harmonize practice took the greater part of a century. The only restriction put on the General Assembly of Virginia by the charter of 1611-12 was that the laws and ordinances it might make should not be contrary to the laws and statutes of England, but the Ordinance and Constitution of the Treasurer, Council and Company in England, for a Council of State and General Assembly, July 24, 1621, read — "reserving to the Governor always a Negative Voice." The Massachusetts Bay charter of 1629 had only the restriction that the laws and ordinances should not be contrary or repugnant to the laws and statutes of the realm. The charter of 1691, however, reserved to the Governor the negative voice, and also gave it to the Privy Council, which was to have three years for rejection. The Maryland charter to Lord Baltimore in 1632 gave him practically complete authority and under it he enforced the prerogative of the veto. The Connecticut charter of 1662 said nothing about any negative on the part of the Governor. His only share in lawmaking came from his being *ex officio* a member of the Council. He presided over it, and by an act passed in 1698 was allowed a casting vote in case that body should be evenly divided.

The Rhode Island charter of 1663 also refrained from giving the Governor power to negative laws. In 1731, Governor Jencks, justly disapproving of the act of the General Assembly by which an issue of bills of credit to the amount of £60,000 had been decreed, "negatived" the bill. His power to do this was immediately contested. The question went by appeal to the law officers of the Crown, in London, and the decision there reached by an examination of the provisions of the charter, sustained the claim of the General Assembly, and settled it that "in this charter no negative voice is given to the Governor," and that when the Governor is present "he is merely a part of the Assembly and included by the majority."<sup>1</sup> It was also decided that "the King himself had no power reserved in the charter either to sanction or to veto any act of the Assembly that was not inconsistent with the laws of England."

Under the Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey (1664), the laws were to have effect for a year but no longer unless confirmed

<sup>1</sup> W. E. Foster, *Town Government in Rhode Island*, 27

by the Lords Proprietors. An explanatory declaration of 1672 specified that the laws were to be confirmed by the Governor and Council. As the Governor was to appoint his Council, this was equivalent to the absolute veto power. On the other hand the agreements as to West New Jersey stipulated that the Governor should not suspend or defer the signing, sealing, and confirming of such laws as the General Assembly might make. The Fundamental Constitutions for East New Jersey (1683), giving the Governor two votes in the Common Council, specifically said he "shall no ways pretend to any negative vote."

Locke's elaborate Fundamental Constitutions of Carolina (1669) prescribed that no act or order of Parliament should have any force unless ratified in open Parliament by the Palatine or his deputy, and three more of the Lords Proprietors or their deputies, and then it was not to continue in force beyond the next biennial Parliament unless in the meantime ratified under the hand and seal of the Palatine himself. The Commission constituting a President and Council for New Hampshire in 1680 directed that the laws should be approved and allowed by them, subject to further confirmation by the Privy Council. The Commission issued in the next century to Benning Wentworth contained this proviso: "And to the End that nothing may be passed or done by our said Council or Assembly to the Prejudice of us our Heirs & Successors We will & ordain that you the said Benning Wentworth shall have & enjoy a negative Voice in the making & Passing of all laws & Statutes & ordinances as aforesaid," etc.

Under Penn's Charter of Liberties (1682) the Governor of Pennsylvania was to have "a treble voice" in the Provincial Council, which was to prepare laws for the approval of the General Assembly, but apparently he had no veto power. The Frame of Government, however, containing forty fundamental laws, was not to be changed without the consent of the Governor, his heirs or assigns, and six parts of seven of the freemen. When in 1696 Markham's modified Frame of Government added a power of initiative on the part of the General Assembly, it was provided that bills must receive the assent of the Governor, with the advice of the Council. The Charter of Privileges under which Pennsylvania lived from 1701 to the Revolution, required confirmation of laws by the Governor. Benjamin Franklin said in the debate in the Federal Convention on the

veto power, June 4, 1787, he had had some experience of this check in the executive on the legislature under the proprietary government of Pennsylvania. The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition, till at last it became a regular practice to have orders in his favor, on the treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter. When the Indians were scalping the Western people, and notice of it arrived, the concurrence of the Governor in the means of self-defence could not be got till it was agreed that his estate should be exempted from taxation; so that the people were to fight for the security of the property, whilst he was to bear no share of the burden.<sup>1</sup>

In New York as long as the Governor sat with the Council, he passed on bills at a session of the Council, the Assembly not being present. After he stopped sitting with the Council, in consequence of a decision of the Lords of Trade in 1735, it was the custom for him to meet with the Council and Assembly in joint session, there consider the bills, and sign such as met his approval.<sup>2</sup>

#### IN THE CONSTITUTIONS

It will be seen that at the time of the Revolution most of the colonies were thoroughly familiar with a share by the Governor in determining what their laws should be. Also, they had long been annoyed by the delays and other irritations due to the need of having their statutes passed upon by the home authorities. Indeed the first three of the facts submitted to a candid world by the Declaration of Independence, as part of the history of repeated injuries and usurpations by the King, were these:

"He has refused his Assent to Laws, the most wholesome and necessary for the public good

"He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them

"He has refused to pass other Laws for the accommodation

<sup>1</sup> Elliot's *Debates*, v, 152.

<sup>2</sup> C. Z. Lincoln, *Constitutional History of New York*, i, 443

of large districts of people, unless those people would relinquish the right of Representation to the Legislature, a right inestimable to them and formidable to tyrants only."

Naturally when the new States came to draft Constitutions, they had little wish to give their executives any controlling part in legislation. New Hampshire started off with a President elected by the upper branch, but having no more authority than a mere presiding officer. South Carolina indeed followed with a President who had an absolute veto, but a bill might be brought in again after an adjournment of three days by the General Assembly and Legislative Council. This Constitution was only a temporary affair for immediate needs, and the revision of two years later took away the veto from the Executive.

Virginia, New Jersey, and Delaware provided nothing in the nature of a veto. Then came Pennsylvania, groping for some way to get mature consideration of laws without giving the Executive any share in the matter. Its remedy was that all bills of a public nature should be printed for the consideration of the people before they were read in General Assembly the last time for debate and amendment, and that, except on occasions of sudden necessity, they should not be passed into laws until the next session. This was quite inadequate and lasted only until 1790, when the veto was substituted.

Maryland, North Carolina, and Georgia put nothing on the subject into their first Constitutions. Then New York produced a new idea. The Constitution drafted by John Jay and adopted in 1777 created a Council of Revision, consisting of the Governor, the Chancellor, and the judges of the Supreme Court or any two of them. If this Council returned any bill within ten days, or if in case of adjournment within ten days of passage it returned the bill on the first day of the next session, the bill could become law only by the approval of two thirds of the members present in each House. It is significant that the very first bill the Council rejected was rejected on the ground of expediency alone.

This Council lasted forty-four years. In that time it returned 128 out of 6,590 bills passed, and as only seventeen of those returned could get the two-thirds vote necessary to make them law, the inference is warranted that on the whole the work of the Council was wise and salutary. When in 1872 a revival of the idea was urged upon the Constitutional Commission, a com-



mittee reporting adversely held that the experiment had signally failed. C Z Lincoln, the able author of the "Constitutional History of New York," takes issue with this. "I cannot believe," he says (II, 508), "that the committee carefully examined the history of the first Council of Revision. My study of its records and work leads me to the conclusion that instead of having 'signally failed' it was a signal success as a part of our early legislative system. It fully appreciated its responsibility for legislation, and its vetoes and other memoranda concerning bills show that it brought to its duties broad scholarship, devoted patriotism, judicial learning, and ability of the highest order, and a sincere purpose to enact only such laws as should conserve the best interests of the State."

Politics brought the Council to grief. Its troubles grew out of the War of 1812. Chancellor Kent as a member of the Council objected to a privateering act passed in 1814. The two Houses of the Legislature sought to uphold the arm of the President and support Congress, while the Chancellor and the judges were Federalists and opposed to the war. This aroused the ire of a fighting Democrat, Martin Van Buren, who was to become President of the United States. He crossed swords with the learned Kent and in the end came out the victor. His chance came in the Convention of 1821. "I object to the Council," he there declared, "because it inevitably connects the judiciary — those who, with pure hearts and sound heads, should preside in the sanctuaries of justice — with the intrigues and collusions of party strife, because it tends to make our judges politicians, and because such has been its practical effect." Governor Tompkins said he believed the framers of the Constitution meant to limit the jurisdiction of the Council to the consideration of constitutional objections to bills. "The Council has become the third branch of the Legislature, with a control equal to two thirds of all the representative branches." Almost without a friend, it went by the board.

The proposal of Erastus Brooks to the Commission of 1872 was that the Council should be revived with a different membership, for it was to consist of two Senators, the chief justice or one of the judges of the Court of Appeals, the Attorney General, and the Governor, the judges and Senators were to be designated by the Governor. Lincoln (II, 508) judiciously objects to the Senators, for they must have already passed on the proposed

legislation and would here sit in review of former action. But he takes issue with the committee that reported the amendment adversely, in respect of its opinion that "while it might be in some respects a valuable safeguard against hasty and improper legislation, it would probably be found too cumbersome and dilatory in its operation to meet with general approbation"

Illinois has been the only State to copy the New York device. The revisory Council created by its first Constitution (1818) was to consist of the Governor and the judges of the Supreme Court. The New York requirement of a two-thirds vote for re-passage was changed to a majority of members elected. The system was used for thirty years. In that time 104 bills were disapproved as compared with 3158 enacted into law, or somewhat more than three per cent, and of those disapproved only eleven per cent were passed over the veto. The messages of the Council are said to have been characterized by ability and insight<sup>1</sup>

Governor Thomas Ford in his history of Illinois tells of two instances in which the Council failed to prevent bad legislation. In 1821 the Governor and judges on returning a bill to charter a State bank, an absurd measure to furnish money and relieve debtors, objected to it as unconstitutional and inexpedient. "It was passed in the spirit of brute force triumphing over the power of intellect" (p 46). The Supreme Court of the United States afterward, in another case, held the principle unconstitutional. In 1837 the disastrous internal improvement system became law in spite of the objection of the Governor and judges. Ford says (p 180) "It is a singular fact that all the foolish and ruinous measures which ever passed an Illinois Legislature would have been vetoed by the Governor for the time being, if he had possessed the constitutional power." His book was completed in 1850, two years after what we now think of as the veto went into the Illinois Constitution. Presumably he had in mind the absolute veto. The Council had been killed under much the same circumstances as in New York. The Democrats were distrustful of the Supreme Court. It had been Whig up to 1841, when the Democrats packed it by increasing its members from four to nine. Though this gave them the control of the court for the time being, they were unwilling to let it retain the veto power, preferring a strong veto in the hands of the Governor.

Vermont, copying in 1777 much of the Pennsylvania Con-

<sup>1</sup> *University of Illinois Studies in the Social Sciences*, March, 1917, 49, 50

stitution, improved on it in this particular with a provision perhaps suggested by the New York idea, to the effect that bills should be laid before the Governor and Council, "for their perusal and proposals of amendment" In 1786 the section was changed so that all bills, whether public or not, should be laid before the Governor and Council, if they returned a bill with proposals of amendment that were not agreed to, it was to be within their power to suspend final passage until the next session, otherwise the final passage took place at once; bills not returned within five days, "or before the rising of the Legislature," were to become law This system prevailed until the veto was provided in 1836

It will be seen that in 1780 Pennsylvania was suspending the final passage of public bills until the next session, Vermont was doing likewise, but giving the Governor and Council opportunity to propose amendments; New York was permitting a Council of Revision, combining executive and judiciary, to require reconsideration and passage by a two-thirds vote. Then Massachusetts, profiting by the experience of these other States and blessed by the genius of John Adams, hit upon the solution of the difficulty that was to be generally accepted There was nothing radically novel in the expedient, for it was simply the New York plan modified by reducing the membership of the Council of Revision to one — the Governor

It seems to me that Mason in "The Veto Power" (p 16) went somewhat far afield in suggesting that the Massachusetts men in giving to the Governor the suspensive veto may have had in mind the refusal of Charles I to approve the bill for regulating the militia, the bill that rapidly led to civil war. Parliament, indeed, afterward gave this bill the force of law without the King's signature and it may have been the first instance where law was made in England by representatives of the people without royal share in the transaction. For more than a decade before that, however, the colonists of Massachusetts Bay had been making laws without the necessity of executive approval, they continued in the practice for nearly half a century longer, and in two of the New England colonies the Governor never had a right to reject bills The credit for the suspensive device should go to Pennsylvania, perhaps to Benjamin Franklin; and it was New York that developed this phase of the system.

The significant thing in the action of Massachusetts was the centering of the veto power in the hands of the Executive. Already her people had tired of being without a separate Executive. They wanted a Governor and they wanted him to be something more than a figurehead. Theophilus Parsons, Jr., in his memoir of his father, the Chief Justice, says (p. 46) one of the reasons for the decisive rejection of the Constitution submitted in 1778 was that the proposed Constitution so carefully avoided a strong government that the Executive was a mere cipher. "The Governor and Lieutenant-Governor were both members of the Senate, and the twenty-second section contained an express provision that 'the Governor shall have no negative as Governor in any matter pointed out by the Constitution to be done by the Governor and Senate, but shall have an equal voice with any Senator on any question before them.' It was this last objection which weighed most with many persons." So when the Convention of 1780 assembled, Adams had no difficulty in getting it to accept a "supreme executive magistrate," who was to have some real control over legislation.

It is singular that, so far as I have observed, the word "veto" appears in none of our Constitutions, save incidentally. Certainly it was not in common use among the men who framed the earliest of them. "Negative" was the familiar term. That appeared in "the negative voice" over which the Massachusetts Bay colonists disputed when they were working out the relations between the General Court and the Court of Assistants (or Magistrates), and shaping our bi-cameral system. After the right of one branch of the legislative body to negative the other had been established, two other kinds of the negative interested the disputations, that exercised by Governors and that exercised by the Crown. With Revolution the power of Governors became for a time the paramount question, out of it developing what we know as the "veto" system. The other question, however, was not dead, but sleeping, to find itself in a new form: "Should the Nation to be created control the law-making of its component parts, the States?"

The differences of opinion thus aroused in the Federal Convention and the fortunate outcome of the controversy have been too much neglected. Sometimes it is of almost as much interest to know what we escaped, and how, as it is to know what we secured.

Each of the drafts submitted to the Convention as a basis for discussion answered the question with a restricted affirmative. That of Randolph would have empowered the National Legislature to negative State laws in its opinion contravening the Articles of Union or any treaty. Charles Pinckney's draft omitted the negative on treaties, but in other language said much the same thing about State laws. When the Randolph provision was first reached, with a slight modification as to treaties, it was, upon Doctor Franklin's motion, agreed to without debate or dissent. That was by no means to end the matter. Eight days later it was reconsidered, and Pinckney moved "that the National Legislature should have authority to negative all laws which they should think improper." Strangely enough, Madison, perhaps on the whole the wisest man in the Convention in matter of political science, and the man to whom more than to any other we owe the frame work of the national government under which we have so well functioned, made an earnest speech in support of Pinckney, and so did James Wilson, another of the great men of the Convention. Gerry and Bedford saved the day with arguments that led to rejection of Pinckney's motion, three States to seven, Madison carrying his own State by a margin of but one vote.

Ten days later came Alexander Hamilton with a powerful plea for strong central authority, but going much beyond the views of the greater part of the Convention. In the sketch he submitted embodying his ideas he proposed not only that State laws contrary to the Constitution or laws of the United States should be utterly void, but also that "the better to prevent such laws being passed, the Governor or President of each State shall be appointed by the General Government, and shall have a negative upon the laws about to be passed in the State of which he is Governor or President." No such proposal, however, was ever brought to a vote.

The next day Madison criticized the Patterson or New Jersey plan for "not giving to the general councils any negative on the will of the particular States." On the other hand Lansing asked if it were conceivable that the General Legislature would have the leisure for such a task. "There will, on the most moderate calculation, be as many acts sent up from the States as there are days in the year." (Now it would be twenty or thirty times that.)

Weeks passed and as the Convention was drawing to its close Pinckney made one more attempt to give the veto power to Congress over all State laws "interfering, in the opinion of the Legislature, with the general interests and harmony of the Union." He softened the proposal a bit by adding the requirement of a two-thirds vote of "the members," which may or may not have been meant to include all the members elected, rather than of those present at the moment. Whether for this or some undisclosed reason, he did better this time, losing only by the narrow margin of six States to five. Possibly the vote of but one man in one of the six delegations opposed, may have prevented a thing we can now see would have been calamitous. Madison himself, in the paper that is printed as an Introduction to his Journal, a paper written late in life, said that although "the votes on it were more than once equally divided, it was finally and justly abandoned, as, apart from other objections, it was not practicable among so many States, increasing in number, and enacting, each of them, so many laws." Surely we ought to be thankful that his earlier judgment did not prevail.

Let it not be overlooked, however, that the Constitution as we have it does give Congress power to annul some State legislation. Congress may by law alter regulations prescribed by a State Legislature as to the times, places, and manner of holding elections for Senators and Representatives. Its consent is necessary for the laying of any imposts or duties on imports or exports by a State, except what may be absolutely necessary for executing its inspection laws, and all laws relating thereto are subject to its "revision and control." No State without the consent of Congress shall "lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." Congress has had no occasion to use most of these powers, but occasionally they have been of importance, as in the case of agreements or compacts between States, recently brought to the front by power and harbor problems.

We have observed that when the Federal Convention met, in the eleven years since the Declaration of Independence, only two of the States, New York and Massachusetts, had so far

overcome their prejudice against Executives as to let them give their Governors any substantial control over the Legislatures. The result had been hasty, ill-considered lawmaking to such degree that thoughtful men were alarmed and the need of some check on a national legislature was generally felt. The real question was what form the check should take. The Convention had at command the experience of several years with the New York and Massachusetts methods.

It was Elbridge Gerry of Massachusetts who, when the subject first came up, upheld the method his State had chosen, against the New York idea of having judges in the council of revision. He prevailed by a vote of eight States to two, but those who lost felt so strongly in the matter that when the subject was brought up again, there was long and earnest debate.

James Wilson of Pennsylvania preferred the New York device, and so he moved "that the supreme national judiciary should be associated with the Executive in the revisionary power." Said he "Laws may be unjust, may be unwise, may be dangerous, may be destructive, and yet may not be so unconstitutional as to justify the judges in refusing to give them effect. Let them have a share in the revisionary power, and they will have an opportunity of taking notice of those characters of a law, and of counteracting, by the weight of their opinions, the improper views of the legislature." Nathaniel Gorham thought the judges were not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Oliver Ellsworth heartily approved the motion. The aid of the judges would give more wisdom and firmness to the executive. They would possess a systematic and accurate knowledge of the laws, which the Executive could not be expected always to possess.

James Madison considered the object of the motion as of great importance. It would be useful to the judiciary department by giving it an additional opportunity of defending itself against legislative encroachments. It would be useful to the Executive by inspiring additional confidence and firmness in exerting the revisionary power. It would be useful to the legislature, by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity, and technical propriety in the laws — qualities peculiarly necessary, and yet shamefully wanting in our republican codes.

George Mason said he had always been a friend to the proviso. Elbridge Gerry saw in it an improper coalition between the executive and judiciary departments. Caleb Strong agreed that the power of making ought to be kept distinct from that of expounding laws. Gouverneur Morris thought there was the justest ground to fear want of firmness on the part of the Executive in resisting encroachments of the legislative, and was extremely apprehensive that the auxiliary firmness and weight of the judiciary would not supply the deficiency. Luther Martin was of the opinion that a knowledge of mankind, and of legislative affairs, could not be presumed to belong in a higher degree to the judges than to the legislature. John Rutledge thought the judges, of all men, the most unfit to be concerned in the revisionary council. The judges ought never to give their opinion on a law till it comes before them.

By the narrowest of margins the judges were left out of the veto machinery. Connecticut, Maryland, and Virginia voted Yes, Massachusetts, Delaware, North and South Carolina voted No, Pennsylvania and Georgia were divided; New Jersey's representation was not present. Hamilton had been left helpless, without a vote, by the defection of the other New York delegates. Those from New Hampshire did not arrive until two days later.

Hamilton had his chance to speak his mind in "The Federalist." In Number 73 of that invaluable series he says the Massachusetts plan was preferred (1) lest the judges, "who are to be the interpreters of the law, might receive an improper bias, from having given a previous opinion in their revisionary capacities"; and (2) lest "by being often associated with the Executive, they might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments." He defended the veto power on the ground that without it, the Executive would be absolutely unable to defend himself against the depredation of the legislative branches. "He might be gradually stripped of his authorities by successive resolutions, or annihilated by a single vote." Also, "It furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly



to the public good, which may happen to influence a majority of that body "

The force of the Federal example led Georgia in 1789, Pennsylvania in 1790, and New Hampshire in 1792 to adopt substantially the Massachusetts plan. The chief modification was in the matter of bills sent to the Governor just before adjournment. Massachusetts had overlooked this difficulty, and had merely provided that a bill should become law if not returned within five days after it had been presented to the Governor. The Federal Constitution gave the President ten days, but if Congress by adjournment should prevent the return of a bill, it was not to become law, at any rate if unsigned. Georgia and New Hampshire took this plan, with a five-day limit. Pennsylvania preferred the ten-day limit and also borrowed from New York by providing that an unsigned bill should become law unless sent back within three days after the next meeting of the Legislature. Kentucky in 1792 copied Pennsylvania. Delaware, however, revising its Constitution in that same year, declined to give the veto power to the Governor.

From that time on, the movement for a while made slow progress. The new spirit of democracy, artificially stimulated by the French Revolution, revived the dread of the Executive that had so powerfully affected the original State Constitutions. Tennessee and Ohio came into the Union without the veto. Kentucky, revising her Constitution in 1799, permitted a majority of the members elected in each House to override the Governor's objections.

After the forces that made Jefferson President had become sobered, the veto gained in favor, and beginning with Louisiana in 1812 no new State except West Virginia has come into the Union without it in some form or other. Louisiana preferred the New York time schedule. Some of the others followed the Kentucky modification in giving the overriding power to a majority. Of the older States Connecticut put the veto into her first Constitution (1818) and New Jersey adopted it in 1844. The others were slow in coming to it, but after the Civil War they fell into line one after another until now North Carolina alone refuses to give the Governor any check on legislation.

The principle of the veto has won dominance because the temper of the people has reversed itself. When our forefathers

revolted, it was largely because of hatred and fear of executives. Now they mistrust, and many of them fear if not hate, their representative assemblies. As typical of the change in attitude, note what Maryland gave as the reason for putting the veto into the Constitution adopted in 1897 "To guard against hasty or partial legislation and encroachments of the Legislative Department upon the co-ordinate, Executive and Judicial Departments." The volteface is interesting — and instructive.

It was a wise precaution New Jersey took in providing that neither House shall vote upon a veto measure, on the same day it receives a bill returned. The veto is not likely to have fair treatment if action is taken before the hostility it arouses has had at least twenty-four hours to moderate. Furthermore, though absentees may technically be presumed to take all risks, yet there is enough of legitimate absence to make it reasonable that important votes shall not be had without warning. In the lack of constitutional requirement or legislative rule, vetoes ought by custom to go over to the next day. Costa Rica goes to an extreme in the matter. Its Constitution requires that a vetoed bill must be discussed in three debates if it has been objected to as a whole, or in two if the Executive has offered amendments. Surely no President or Governor could ask for more protection.

Inasmuch as the veto is inconsistent with responsible (Cabinet) government, and as in these days that form prevails almost everywhere except in the United States, little light is to be thrown on the subject by the experience of other nations. As a matter of historical interest it may be noted that the French Constitution of 1791, destined to collapse within a year, gave the King a negative on the acts of the Assembly, with some feeble limitations. If he refused his assent and the following two Assemblies should successively present the same bill in the same terms, it was then to become law.

Procedure of the same sort may be used in Norway. There if in spite of the King's veto a measure passes without change three regular Storthings convened after three successive regular elections, and separated from each other by at least two intervening regular sessions, it is to become law. The process is slow, but several important measures have prevailed by means of it, against the strong opposition of the King. It has been used but once since the coming of ministerial responsibility and is

not likely to be used again. The principle, of course, is in essence that now applied in the relations between the English House of Lords and the House of Commons. Kindred procedure was adopted by Finland, but with requirements not so stiff. There a vetoed measure prevails if adopted after a new election without amendment and by absolute majority. In Lithuania the President can postpone promulgation and have a referendum unless the measure was originally declared urgent by a three-quarters majority or unless it is passed over his veto by a three-quarters majority. The Constitution that Germany adopted after the World War required the President to promulgate a measure passed by a three-fifths vote of the Reichstag or else to submit it to a referendum. Also he could postpone for referendum a measure passed by both Houses.

In Canada the Governor-General, or in other words the Dominion Government, may within a year disallow a provincial enactment held to be inimical to the general interest of the Dominion. It is now the view that this may be legitimately done only where a bill passed by a provincial Legislature is plainly beyond its powers, *ultra vires*. A Lieutenant-Governor may hold a bill to await the judgment of the Governor-General and in that case it cannot go into effect unless official notice of approval is received within a year. Comparatively few bills have been disallowed.

In Ireland the procedure is much the same as in Canada, the representative of the Crown having the right to reserve a bill to await the King's pleasure, which is to be expressed within a year.

#### AMOUNT AND NATURE OF USE

The use of the vetoes by Governors is increasing, but not with a regularity warranting definite deductions. States vary greatly in the matter. In 1915 in New York 223 bills were vetoed out of 980. In the same year Governor Brumbaugh of Pennsylvania vetoed 272 measures, more than a quarter of all that came to him, and the Governor of California vetoed 225 out of 996. In 1917 Governor Lowden of Illinois vetoed 69 out of 407, the largest number since the 72 vetoed by Governor Palmer in 1869-70.

On the other hand, though the first three Governors of Iowa used the power nineteen times, in the last sixty years it has been

used only something more than thirty times. In Massachusetts from 1911 to 1915 inclusive, with Governors of a party other than that of a majority of the Legislature, there were eighty-seven vetoes, and in the case of twenty-eight of these the measure was repassed by the necessary two-thirds vote. In 1916 and 1917 together, with Governor and a majority of the Legislature of the same party, there were twenty-one vetoes, of which but one was overridden; in two cases the veto was laid on the table and a substitute bill was passed that met the Governor's approval. The average for the seven years was a little more than fifteen a year. The total number of Acts and Resolves becoming law in that period was 6249, an average of 893 a year, so that less than two per cent of the measures sent to the Governor were vetoed. Taking the country through, in 1915 about seven per cent of the bills passed were vetoed in whole or in part. In Pennsylvania from 1901 to 1924 there were vetoed fifty-three bills appropriating money, with an average of 121 appropriation bills reduced each session and 115 single-item bills scaled down.<sup>1</sup> The power to veto in part, so far chiefly confined to items in appropriation bills, is one of the factors making difficult any comparison with earlier records.

If we had comprehensive statistics as to the number of instances in which the judgment of the Governor came to be accepted by the Legislature during a series of years, they would shed some light on the question of comparative efficiency, but not clarify it completely, for the important elements of partisanship and personal popularity cannot be appraised. When the Governor and a majority of a Legislature are of the same party, the legislators are loath to override a veto, however unwise they may think it to be. In some Legislatures the Governor has so many friends that fair judgment on his vetoes is out of the question, and in others a bitterly hostile faction will favor anything the Governor opposes. Therefore not much weight is to be attached to the fact that in 1915 in Michigan more than half of fourteen vetoes were overruled by a two-thirds vote; or on the other hand to the fact that in only five out of thirty-nine States were any bills or parts of bills passed over the veto; that out of a total of 1066 vetoes only twenty-two failed; that when this was written, in Illinois since 1870 only two bills had been passed without the Governor's approval, and that in Iowa none

<sup>1</sup> *American Political Science Review*, November, 1924

at all had been so passed. If, however, it is taken into account that Iowa has in sixty years averaged only about one veto every two years, the record would seem high testimony of the excellence of Iowa lawmaking during all the period when Legislatures are said to have become degenerate, and a remarkable refutation of the slanders to the contrary so commonly accepted.

Another muddling factor in the attempt to generalize comes from the power of the Governor to let measures become law without his signature. It is never certain whether he does this because he will not endorse a measure he has not had time to investigate, or because he mildly opposes, or because he is manufacturing political capital. For example, who will undertake to appraise the motives of David B. Hill of New York? In thirty-eight years his predecessors had allowed only 94 out of 22,652 bills to become law without action on their part, but in seven years Hill allowed 982 out of 4709 thus to become law.<sup>1</sup> Benjamin F. Butler, pugnacious Governor of Massachusetts, in 1883 allowed 48 measures to go on the statute book without approval. In 1917 Governor Lowden of Illinois so treated 113 measures.

The use of the veto power by the Presidents naturally has aroused the most discussion. From it we may get light on the basic principles involved. The outstanding things are the increase in the use of the power and the change in the conception of its purpose. Some at least of the men who devised it, took a broad view of its function. Alexander Hamilton said in the *Federalist* (No. 73). "The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself, the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design." Oliver Ellsworth said at the first session of the Senate that the President is, as regards the passage of bills, but a part of Congress.<sup>2</sup>

The Presidents themselves, however, began with a much narrower theory. Washington vetoed but two bills. One, an apportionment bill, he sent back on the ground of unconstitutionality. Jefferson urged him to it not only on that ground, but also in order to assert a power that otherwise the people might come to believe was never to be exercised. The objection to the

<sup>1</sup> *The Nation*, May 19, 1892.

<sup>2</sup> Woodrow Wilson, *Congressional Government*, 52.

other measure was that it was ill-drawn and contradictory. My own examination of it discloses nothing save a difference in judgment, but of course we are to assume that any reasons advanced by our first President were sincere. Neither Adams nor Jefferson vetoed any bill. Jefferson's opinion was that "unless the President's mind, on a view of everything which is urged for and against the bill, is tolerably clear that it is unauthorized by the Constitution — if the pro and con hang so even as to balance his judgment — a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion." Madison and Monroe in sixteen years vetoed but seven measures, six of them on constitutional grounds and one on account of a defect in drafting. John Quincy Adams vetoed nothing.

For two-score years, then, after the framing of the Constitution, it was supposed that the veto should confine itself to constitutionality and form. Then came Andrew Jackson with the far wider conception that it should go to expediency. He was the first of the Presidents to set up his judgment in matter of substance as superior to that of the two Houses of Congress. To his enemies this seemed arrogant, insolent, despotic. It threw the opposition Senators into a rage. Henry Clay declared: "The veto is hardly reconcilable with the genius of representative government. It is totally irreconcilable with it if it is to be employed in respect to the expediency of measures, as well as their constitutionality." Webster, Calhoun, and Ewing joined in the denunciation, and their speeches were used as campaign documents. The popular verdict was significant. Not wholly by reason of Jackson's view and use of the veto, but at least partly on account of it, he was re-elected with 219 electoral votes out of 286.

The Whigs refused to accept the verdict. They kept on denouncing what they deemed a dangerous abuse. What was their dismay, then, after they had gained control by electing Harrison, and his untimely death had put Tyler in the White House, to find Tyler renouncing their doctrine by his veto of Henry Clay's Bank Bills! A week after the second veto the Whig members of Congress issued an Address to the people, in which they declared that one of the duties their party felt itself called upon to perform, "conspicuously and prominently above all others," was "a reduction of the Executive power by a further

limitation of the veto so as to secure obedience to the public will as expressed by the immediate representatives of the people and the States, with no other control than that which is indispensable to avert hasty or unconstitutional legislation." They proposed to place on their party banner, "The will of the people uncontrolled by the will of any one man."<sup>1</sup>

The next year Clay proposed constitutional amendments empowering Congress to pass a bill over the President's veto by a majority vote, and presented his arguments carefully. Really and in practice, he held, this veto power drew after it the power of initiating laws, and in its effects must ultimately amount to conferring upon the Executive the entire legislative power of the government. "With the power to initiate and the power to consummate legislation, to give vitality and vigor to every law, or to strike it dead at his pleasure, the President must ultimately become the ruler of the nation."

Is it not singular how so many great men have foreseen extremities never reached!

Clay clung to his rancor, and when again a candidate for the Presidency, in 1846, one of the few positions his friends could induce him to take was that he would not use the veto power "except in cases of clear violation of the Constitution, or manifest haste or want of consideration by Congress."

Polk, in his message of December, 1848, came out clearly with the doctrine that was to prevail. "The people, by the Constitution," he said, "have commanded the President, as much as they have commanded the legislative branch of the government, to execute their will. They have said to him in the Constitution, which they require he shall take a solemn oath to support, that if Congress pass any bill which he cannot approve, 'he shall return it to the House in which it originated, with his objections.' If it be said that the representatives in the popular branch of Congress are chosen directly by the people, it is answered, the people elect the President. If both Houses represent the States and the people, so does the President. The President represents in the executive department the whole people of the United States, as each member of the legislative department represents portions of them."

One of the Whigs who had fought Polk was Abraham Lincoln. In a brief paper that he wrote as being what he thought the

<sup>1</sup> *Niles' Register*, LXI, 36, September 3, 1841

Whig candidate, General Taylor, ought to say, we find: "Were I President, I should desire the legislation of the country to rest with Congress, uninfluenced by the Executive in its origin or progress, and undisturbed by the veto unless in very special and clear cases."<sup>1</sup> General Taylor himself declared that the veto power should never be exercised "except in cases of clear violation of the Constitution, or manifest haste and want of consideration by Congress."

Lincoln was to modify his view somewhat. When he himself had been chosen President, he said in a speech at Pittsburg, February 15, 1861: "By the Constitution, the Executive may recommend measures which he may think proper, and he may veto those he thinks improper, and it is supposed that he may add to these certain indirect influences to affect the action of Congress. My political education strongly inclines me against a very free use of any of these means by the Executive to control the legislation of the country"<sup>2</sup>

It was with Andrew Johnson that the controversy became acrimonious again, as it is apt to do whenever an Executive is out of harmony with his Congress or Legislature. Johnson vetoed twenty-one bills, including the chief measures for Reconstruction; fifteen of them were passed over his veto. It is often stated that he was the first President whose veto was overridden, but this is not the case, for one bill was passed in spite of Tyler's objections, and five bills became law against the will of Pierce.

Grant went over to what had been the Democratic view. He vetoed 43 measures, besides letting 136 become law without his signature. For one veto he gave as a reason that it was "a departure from the true principles of finance, national interest, national obligations to creditors, congressional promises, party pledges (of both political parties), and personal views and promises made by me in every annual message sent to Congress and in each inaugural address."

Cleveland wielded the veto power more than any other President thus far. He vetoed more bills than all his predecessors put together — 346 in all, besides a dozen pocket vetoes. With his customary directness, he put himself squarely on record with the opinion that the veto power was given "for the purpose

<sup>1</sup> *Addresses and Letters of Abraham Lincoln*, I, 134

<sup>2</sup> H. J. Raymond, *Life and Public Services of Abraham Lincoln*, 139



of invoking the exercise of executive judgment and inviting independent executive action " Most of his vetoes were of pension bills The Senate Committee that considered these, still looked at the other side of the shield, declaring: "It cannot be maintained upon any fair construction of the Constitution that the power of executive disapproval ought to be exercised upon acts of this character for the sole reason that the President differs in opinion from Congress upon a mere question of the weight of testimony, or upon the expediency of a special act, which subserves a proper general purpose and which imperils no power of any other department "

Nevertheless practice has now established beyond dispute by anybody but theorists, that the President may exercise judgment and may veto on the ground of expediency President Taft unquestionably voiced present-day opinion when he wrote: "If anything has been established by actual precedents, it is that a President in signing or withholding signature must consider the wisdom of a bill as one of those responsible for its character and effect " <sup>1</sup> Woodrow Wilson, long before he became President, reached a like conclusion "In the exercise of the power of veto," he said, "the President acts not as the executive but as a third branch of the legislature " <sup>2</sup> At least one of our Supreme Courts has given to the same doctrine the weight of judicial sanction. In *Commonwealth v Barnett*, 199 Pa. St. 161, Justice Mitchell, delivering the majority opinion, said. "The governor is an integral part of the lawmaking power of the State .. His disapproval, commonly known as a veto, is essentially a legislative act The fact that the Governor is limited to negation or concurrence and cannot affirmatively initiate or amend legislation, does not take away the legislative character of his act, any more than the want of power in the Senate of the United States to originate revenue bills changes its standing as a co-ordinate branch of Congress. In this view all the authorities concur "

So learned an authority on constitutional law as Doctor Von Holst has taken the opposite ground He bases his argument on the very first section of the first Article of the Constitution: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives " From this he concludes that the co-

<sup>1</sup> *Our Chief Magistrate*, 16

<sup>2</sup> *Congressional Government*, 52

operation of the President in the matter of legislation is intended only as a control "Congress alone," he declares, "is the author of the laws. If the President has objections to raise against the legislative conclusions of Congress, he is in duty bound to submit the latter for reconsideration. Then, in order to become laws, they must receive a two-thirds majority in each House. It is, therefore, unquestionably an abuse of language that the refusal to approve a bill should be called a veto, not only in ordinary speech, but also in official terminology. The word is not to be found in the Constitution. It is borrowed from a date of affairs essentially different and does not harmonize with the constitutional nature of the President's co-operation in legislation" <sup>1</sup>

It is true enough that the name is unfortunate. The thing itself, however, has become definite and is vital, regardless of whether it is or is not what the authors of Constitutions meant it should be

An episode in Massachusetts may show how thoroughly, even if unconsciously, we have come to attach the legislative character to the veto Governor Eugene N Foss, an owner of much land, had before his election appeared at a hearing of a legislative committee in favor of a bill for a certain street extension While he was in office a bill to that end came up to him and in May, 1911, he vetoed it, giving the facts, and saying "It must be evident, however, that an interest in property affected by this bill disqualifies me from having any part in this legislation, and leaves me no alternative but to veto the measure" A few days before, he had allowed a similar bill, concerning a street in the same general locality, but presumably not affecting his interest so closely, to become a law without his signature

Notice the unhesitating assumption of Mr Foss that to sign would be to take a part in legislation But did he play no part in it with his veto? There is a pretty dilemma The casuists may get much delight from arguing it Is law made when change of statute or exception to statute is refused? Is the negative less of a command than the affirmative?

The nature of the veto power has been considered by the courts. In a California case involving the signature of the Governor after adjournment (which was held not permissible),

<sup>1</sup> *Constitutional Law of the United States*, 112

the court said "in approving a law he is not supposed to act in the capacity of the executive magistrate of the State, whose duty it is to see that the laws are properly executed, but as a part of the legislative branch of the government" <sup>1</sup> Later in the same State, however, the court brought out what has become the prevailing view, to the effect that it does not follow because elsewhere in the Constitution the Governor was included as part of the lawmaking power, such with reference to the law about adopting city charters was the effect of the provision: "The legislative power of this State shall be vested in a Senate and Assembly, which shall be designated as the Legislature of the State of California" The Court said "the Governor is not, in fact, a part of the legislature," and also said that "the legislature is one thing and the lawmaking power of the State another" <sup>2</sup>

In West Virginia, where a law is to go into effect ninety days after the passage of a bill, question rose as to whether "passage" means the day of passing the two branches. The court there held that the Governor's veto amounted to an appeal for reconsideration by the legislative branch, and not to a defeasance of the passage of the bill. It interpreted the action of the Governor as deliberative, not legislative. Justification for this was found in the fact that a bill could be passed over this veto by a bare majority, "showing that it was not intended that he should have any legislative power, not even the casting vote." Reading of the West Virginia Constitution indicates that the court ignored one consideration. There although if the second branch amends, the first must agree by a majority of all members elected, yet otherwise it would seem that a majority of those present suffices, in which case inasmuch as passage over a veto requires a majority of all elected, it might be argued that he does in some measure have legislative power <sup>3</sup>

In a New York case it was contended that the Legislature might give immunity to witnesses because it was the sole custodian of the legislative power Justice Cardozo, however, said it is not the sole custodian, the power is divided between the Governor and the Legislature, the one as much as the other is an essential factor in the process.<sup>4</sup>

<sup>1</sup> *Fowler v. Pierce*, 2 Cal 165 (1856)

<sup>2</sup> *Brooks v. Fischer*, 79 Cal 173 (1899).

<sup>3</sup> *State v. Mounts*, 36 W Va 179 (1892)

<sup>4</sup> *Matter of Doyle*, 257 N Y 244 (1931)

Another phase of the matter was brought out that same year by the Michigan court. Said Justice Fead: "The veto power is a legislative function, although it is not affirmative and creative, but is strictly negative and destructive."<sup>1</sup> This would seem to be open to question if legislating and lawmaking are the same thing, for surely the making of anything is creative. Even the repeal of a law is in some sense creative, for it changes status. To prevent the enactment of a law does not change status.

#### IS THE INSTITUTION SATISFACTORY?

Of more practical importance is the question whether what we call the veto is in its present application a useful and satisfactory institution. A Texas Professor of Government (Herman G. James) said in the *American Political Science Review* for May, 1915: "That the veto power given to the Governor is both actually and potentially a very powerful political weapon of control over the legislative body, is admitted, but it is difficult if not impossible to show that it has worked out for good or is likely to do so. If the executive and the legislative are politically in accord the veto is superfluous, if they are not in accord it is a certain means of producing deadlocks and halting all progress." It would be hard to find a more instructive illustration of the danger in generalizing as the result of a circumscribed observation of facts. Further study might have informed Professor James of scores of useful vetoes where Governor and Legislature were politically in accord, and other scores where, with Governor and Legislature of opposite parties, no deadlock followed the veto and progress was not halted.

There can be no question that the veto has prevented the enactment of many, many measures that ought not to have been enacted. But at that point the argument only begins. It cannot be proved that in these cases there would have been enactment had there been no veto power. It is probable that enactment might sometimes have taken place, and it is equally probable that sometimes it would not have taken place. The very existence of the veto power encourages Legislatures to send imperfect or even improper bills to the Governor. An extreme illustration of this comes from California where it is said the Legislature went so far as to pass contradictory measures, leaving it to the Governor to choose one or reject both.

<sup>1</sup> Wood v. State Administrative Board, 255 Mich. 220 (1931)

There can be no doubt that where the Governor and the majority of the Legislature are of opposite parties, bills are sometimes passed for the deliberate purpose of embarrassment, compelling the Governor to choose between signing say an extravagant appropriation in which he does not believe, and losing some measure of popularity. On the other hand Governors unhampered by scruples, without fine sense of duty, have used the veto with the deliberate purpose of making political capital by the appeal to popular sympathy. When one man sets up his opinion against that of two or three hundred, the masses are almost sure to approve his position because he is the under dog. The sort of message that kind of a Governor finds it easy to write, gets wide reading and hasty applause. The arguments of the authors of the bill, who may know a hundred times more about it than the Governor knows, and who may be men of the soundest judgment and loftiest purpose, are ignored. The Legislature is a sure loser in the unequal contest. The honors go to the virile, aggressive man of dominating personality who is willing to climb at the expense of fair play and the public welfare.

Recourse to this means for getting prestige and advancement has become not infrequent since opinion has approved the great widening of the scope of the veto. Coming too early to observe the full effect of this, Lieber was led to think it very clear that without the veto power the Executive either loses all energy or is at war with the Legislature.<sup>1</sup>

Experience since his time has shown that the veto fosters rather than prevents war. He had more excuse for saying that without the veto power "the sway of public opinion is impaired or annihilated," though the certainty of such extremities may be doubted. The clear thing is that the veto does rivet public attention on controversies that would escape notice if buried in the routine of ordinary legislative processes. Therefore if the veto accomplishes no more than to make men think and talk about at least some public issues, it is not without advantage.

Arguing along the same line with Lieber, Professor H. J. Ford holds the secret of the strength of the veto power to lie in the fact that presidential authority is founded on the direct mandate of the people. He thinks that the power is sustained, not by strength of prerogative, but by the representative char-

<sup>1</sup> *Manual of Political Ethics*, 2d ed., II, 390

acter of the presidential office. The development of executive authority has been sustained by public sentiment because it has forged an instrument of popular control. Congress represents locality, the President represents the nation. Levi Woodbury, who was a cabinet officer under Jackson and Van Buren, and became a justice of the Supreme Court, in a speech at Faneuil Hall, October 19, 1841, described the constitutional function exactly when he said, "The veto power is the people's tributory prerogative speaking again through their executive."<sup>1</sup>

All this seems to me to be out of harmony with the facts. It puts the cart before the horse. The people rarely wake up before a President or Governor vetoes. It is ordinarily his act that arouses interest. Of course he gets his power from Nation or State as a whole, but it is a general power, with very seldom anything like a specific mandate on which he can rely in taking issue with Congress or Legislature. After he has acted, he may indeed look confidently for more of popular approval than perhaps he deserves, but I much doubt whether his representative character has as much to do with this approval as the fact that the prerogatives of high office give an artificial authority which leads many citizens to forego their individual judgments. This authority may or may not be exercised in harmony with what uninfluenced would be found to be the collective wisdom of the electorate. In other words the Executive leads rather than follows.

Lieber averred it to be a belief of modern constitutional law that "the Executive should have a concurrent authority in making laws, partly in order to prevent the absolute tyranny of the Legislature, of which history gives many instances, partly to pledge the Executive to the execution of laws by securing his consent to their enactment." This might be true of the absolute veto, but its force is not clear in the matter of the suspending veto that can be overruled by a majority or by a two-thirds vote. It might be that an Executive would be more inclined to refuse the enforcement of a law enacted against his protest than a law on which he had not been consulted at all.

Such doubts make me hesitate to accept Lieber's conclusion that "this constitutional concurrence will be found, upon thorough inquiry, to belong to those main constitutional dis-

<sup>1</sup> *Rise and Growth of American Politics*, 187

coveries characteristic of modern times, and to those political guarantees which are peculiar to civil liberty." If such was the lofty character of the American veto in its earlier years, there is grave reason to fear it has degenerated into a much less honorable piece of political machinery. John Ordronaux, writing in 1891, when Cleveland's many vetoes were fresh in mind, said that vetoes had multiplied to such a degree as to have lost most of their terror, and all of their moral weight. "They no longer shake the faith of the people in the honesty or capacity of their representatives, nor impart to the act of the President the character of a vermillion decree. They are now regarded merely as differences of opinion upon questions of public policy, which all admit must become more perplexing as they become more miscellaneous, and make calls upon powers of Congress, whose limits in these particular directions have not yet been officially determined."<sup>1</sup>

Since that was written the veto has traveled far toward still another phase, that of its use for exalting the executive. In this direction lie the serious problems it will bring us in the immediate future.

#### IMPROVEMENT OF MEASURES

The veto is destructive. Should there be coupled with it anything constructive? There are strong reasons for answering Yes. They are not altogether new reasons. Back in colonial days Governors saw the desirability of being able to improve the bills that came to them, rather than to reject them *in toto*. Hutchinson, writing of happenings in Massachusetts Bay in 1761, and saying that though both Houses professed to pay great regard to forms of proceeding in Parliament, they were not strictly adhered to, recalled: "After a vote, or even a bill, had passed both Houses, the Governor would sometimes decline his assent in the form it had passed, and propose amendments or alterations; and they have been agreed to which is not warranted by the practice of Parliament. This irregularity was encouraged in Mr. Shirley's administration, to facilitate his measures to be carried through the Assembly."<sup>2</sup> Vermont saw the good side of such a practice and until 1836 permitted the return of bills with proposals for amendment.

<sup>1</sup> *Constitutional Legislation in the United States*, 105 (1891).

<sup>2</sup> *History of Massachusetts Bay*, III, 90.

Nothing more was heard of the idea until 1901, when Alabama provided that if a veto message from the Governor proposed amendment which would remove his objections, the House to which it was sent might so amend, and if the other House accepted without change the amendment so made, the bill should return to the Governor to be acted upon like other bills. As the Houses were to act by majority vote, the practical result was to be the same as if the amendment had been moved by a member, barring the requirement that the other House accept without change.

Governor Emmet O'Neal of Alabama warmly approved the working of this plan. He told the Governors' Conference of 1911 that the power had proved of great value. By its exercise the Governor had been enabled in many instances to amend a meritorious statute otherwise unconstitutional, so as to give it validity, or to suggest omissions or additions that would better adapt the proposed law to the conditions it was designed to meet. The Executive, he urged, has a practical experience, in which members of the Legislature are frequently and of necessity wanting, which peculiarly qualifies him to point out the parts in which a proposed law is insufficient, onerous, or ill-considered, and to remove by his amendment those features which bear too heavily on rights which should not be burdened or impaired, or to add those without which the act would be ill-balanced, ineffective, or incapable of practicable or proper enforcement. He said there had been no instance in the course of his administration where proper amendments had not been adopted by the Legislature, nor did he recall such an instance in the administration of his predecessors. In defense of the theory he argued: "Nor is this power any undue extension of the executive function. If the Governor is properly a part of the lawmaking power to the extent of approving or disapproving bills, if the public is entitled to his judgment on the laws affecting it, it is an illogical limitation on that duty to restrain it within the narrow channels of approval or disapproval of a bill as it stands when, with the elimination of unwise provisions or the addition of needed sections, it could be easily altered into fitness to serve a beneficial purpose."<sup>1</sup>

In the lack of provision of this sort, the chief source of trouble has been the common if not universal rule of legislative bodies

<sup>1</sup> *Proceedings*, 27, 28



that an engrossed bill shall not be amended. The rule is wise, not only because there must be an end to everything, but also because the work of engrossing ought not to have to be done twice. Nevertheless occasionally the Attorney General or the Governor himself will detect some error or note a desirable change. The measure can be recalled from the Executive Chamber, but if it can be reopened for amendment only by unanimous vote, one stubborn opponent can endanger the whole thing, which ought not to be.

Virginia in 1902 and Massachusetts in 1918 followed the Alabama precedent with constitutional change in this particular.

The desirable end could be accomplished without constitutional amendment by change in the rules that set a time limit on the introduction of new business and require that no measure substantially the same as one already acted upon shall be considered at the same session. Exception might be made for the subjects of veto messages. It will be answered that at any rate in States having annual sessions, no great harm will come from postponement. This familiar answer is one of the most mischievous phenomena of our legislative processes. It is a half truth. No great harm will in fact come from delaying the application of most laws, but serious damage comes from compelling consecutive Legislatures to go over the same ground again and again. That wastes an enormous amount of time and energy. Once there has been a fair approach to agreement, the wise course is to get the thing out of the way. Technicalities ought not to make legislative burdens heavier.

In Australia "the Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation." This is no more than formal recognition of a procedure to which our Presidents have resorted. For an example note the veto message sent in by Mr. Wilson April 18, 1918, in which he called attention to words susceptible of an interpretation that he assumed not to be the intention of the Congress, and he suggested words to be substituted. Tyler in 1845 pointed out ambiguous language in a bill he returned, and Grant, May 14, 1872, showing that a certain phrase had obviously no meaning whatever, suggested the language that might meet the intention of the framer of the bill.

## CHAPTER VI

### VETO DETAILS

THE size of the vote necessary to pass a measure over the veto is not so arbitrary and unimportant a matter as at first glance might be thought. If only the same vote is required for first and second passage, then the interposition of the veto has no more significance than a motion to reconsider made by a member, save for the prestige given to the Governor's act by his office and personality. If, however, a larger vote is required the second time, then the share of the Executive as a legislator is more definite. This may be sought by requiring an affirmative vote of a majority of all members elected, where the first majority had been of all present, or an affirmative vote of a larger fraction of members present or elected. The earliest provisions all contemplated a larger vote, but were inexact. New York permitted re-passage by two thirds of the branch to which the measure was returned, but in respect of the other branch said — "two thirds of the members present" Massachusetts copied this

New York clarified the situation when in 1821 it abolished the Council of Revision and gave the veto to the Governor alone. Re-passage was to be by a two-thirds vote of members present. Peter R. Livingston tried hard to make it a majority vote of all members elected, and after that was refused, Dodge of Montgomery wanted to make it such in the case of a measure vetoed on the ground of expediency, but this got even less support. In the Convention of 1846 the proposal of a majority vote for re-passage was defeated, 61 to 36. The controversy was renewed in the Convention of 1867, and then on recommendation of the Commission of 1872 change was made to a requirement of two thirds of all members elected.

In the Federal Convention as soon as it had been decided that the Executive should be a single person rather than three persons, question rose as to how much control the Executive should have over the legislative branch. Wilson and Hamilton wished to give the Executive an absolute negative on laws, but when it came to a vote only King agreed with them. Experience with

colonial Governors who could exercise the absolute veto was fresh in mind. Of the Pennsylvania Governors Benjamin Franklin told the Convention. "No good law whatever could be passed without a private bargain with him. An increase of his salary or some donation was always made a condition, till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might receive the former before he should sign the latter" <sup>1</sup>

Gerry's motion had left a blank for the size of the vote to overrule the Executive, and Madison says it was filled with "two thirds" *sub silentio*. This was the fraction that had been used in New York and Massachusetts, and at first it aroused no objection, but when the matter was reached again after the Committee on Detail had reported, upon Williamson's motion and apparently without discussion the friends of a powerful Executive changed it to "three quarters," by vote of six States to four, with Pennsylvania divided.

Madison's Journal does not disclose how it happened that when the Committee on Detail reported the draft for final polishing, appeared in it instead of "three quarters" "two thirds" Randolph a few days before had given "three quarters" as the ground for one of his objections and apparently the Committee substituted "two thirds" on its own responsibility. Perhaps George Washington had a hand in this, for when, after some discussion, a vote was taken, Washington had his vote recorded for "three quarters," almost the only time his name appears in the record of proceedings. But for his vote Virginia would have been tied. He could not, however, win over enough of the other States, "two thirds" prevailing by six States to four, with New Hampshire divided. Evidently the change of a very few votes determined the result in favor of those who feared a strong executive. Were that vote to be taken to-day, in the present temper of the public it would not be hazardous to predict that Washington's view would win — possibly even Hamilton's preference for an absolute negative. Perhaps, though, the legislative branch may yet regain its prestige.

Friction caused by the vetoes of some Presidents has led to numerous proposals in Congress for amendment of the Federal Constitution to provide for overruling by a majority instead of

<sup>1</sup> Madison, *Debates*, June 4, 1787

a two-thirds vote. Resentment against vetoes by Jackson and Tyler brought ten such proposals between 1833 and 1842. In the course of the next half century six more were made, but not pushed. Then Cleveland's large use of the veto incited energetic attempt to curb the power of the President, but it did not succeed.<sup>1</sup>

In State and Nation this has been symptomatic of the varying views in regard to the relative power of the Executive. Always there have been those wishing to give him more power and those wishing him to have less. The difficulty in the way of definite deduction in this particular matter of the veto is that two thirds of all present may sometimes be more, sometimes less, than a majority of all elected. Therefore I am not so certain as some writers that Kentucky curbed the Governor when in 1799 it changed from two thirds to a majority of all elected. It depends on whether Kentucky had or had not construed the two-thirds requirement to be of a quorum as in Massachusetts. The probability is, however, that the seven States which now make it a majority of those elected, think their Governors have less power than elsewhere. There can be no doubt in the case of Connecticut, which alone permits a majority of those present to overrule the Governor. Fifteen of the States go to the other extreme with a requirement of two thirds of those elected. Four approach that with three fifths elected, and one (Rhode Island) makes it three fifths present. On the whole the tendency has been to increase the Governor's share of legislative power. Only one State, Ohio, by changing from two thirds to three fifths in 1912, has of late gone in the other direction. On the other hand Oklahoma and Arizona have given a sign of the times by requiring a three-quarters vote to pass an emergency measure over the veto.

Professor Fairlee could not find any strong demand to increase the over-riding vote in States where a majority now suffices. Governor Willson of Kentucky vetoed many measures, chiefly appropriations; and only two received the majority vote required to overrule his objections. He was inclined to think the requirement of a two-thirds vote is very rarely necessary, and as apt to be wrong as right. Former Governor Beckham of that State definitely preferred the majority requirement.<sup>2</sup> Governor

<sup>1</sup> M. A. Musmanno, *Proposed Amendments to the Constitution*, 67, 68.

<sup>2</sup> "The Veto Power of the State Governor," *Am. Pol. Science Rev.*, Aug., 1917, p. 490.

Baldwin of Connecticut favored a two-thirds vote, but said the bare majority required in that State was seldom obtained. Governor Cross of the same State in his inaugural message in 1933 recommended for the second time change to two thirds, but again in vain.

In Finland, where there is but one Chamber, a veto by the President can be overcome only after a new Chamber has been elected, and then only by majority vote of all elected. It was provided in the Constitution for Czechoslovakia that a veto might prevail by majority votes of both Houses, and there was unique provision that upon failure to get such majorities, it might prevail by a three-fifths vote of the Deputies. France in effect requires only a majority, for the power of the President does not go beyond the right to request of the two Houses "a new discussion." This, however, cannot be refused. The Constitution adopted by Peru in 1919 appears to have allowed overriding the Chief Executive by the ordinary majority. This Constitution presented an innovation in giving to each of the two Houses something akin to what was the novelty in our veto system. In two-chambered bodies the world over each House, by refusing to pass bills of the other, has had in effect an absolute veto power. Peru substituted for this what we sometimes describe as "the suspensive veto." There if one House amends or rejects a bill coming from the other, and if upon its return the originating House re-passes it by a two-thirds vote of all members elected, it prevails unless the revising House insists to the contrary by likewise a two-thirds vote of all members elected.

Mexico in 1917 abandoned the simple-majority requirement that had been in force since 1857, substituting requirement of a two-thirds vote of the total membership. Uruguay, also acting in 1917, provided for re-passage of vetoed bills by a three-fifths vote of members present at a joint session of the two Houses.

The Constitution of the German Commonwealth (1919) contained a new variation of the veto power. It prescribed that a law enacted by the National Assembly should be referred to the people before its promulgation, if the National President so ordered within a month. This was in addition to the requirement that a law should be so referred on the demand of one third of the National Assembly or of one twentieth of the qualified voters. Many of our States have recently given this power

to a specified part of the electorate, but with reasons absent in the case of the Executive. Is it on the whole wise to give to one man, even if he be the Chief Executive, the chance to thwart what may be the unanimous will of the legislative branch, or at any rate delay its application?

In minor details there are with us so many variations that it is clear we have not yet learned from experience what is wisest. Some of the States restrict the veto to bills, others include resolves or resolutions or both. Some except the business peculiar to the Houses, or make specific exceptions.

From the point of view of theory, about the only really important phase of these complications is that concerned with the constant attempt of the legislative branch to evade executive control. Note for instance the use of such procedure as that of concurrent resolutions. There has been sharp criticism because Congress has in this way taken away from the President sundry matters over which the critics think he ought to have such power as the veto gives. The Constitution would seem to be explicit: "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except a question of adjournment) shall be presented to the President," etc. Yet for more than a hundred years no concurrent resolution has been sent to the President.

The theory is that the substance rather than the form should govern, and that concurrent resolutions have never contained anything really legislative. For this reason the House did not ask President Johnson in March, 1866, to approve its resolution that no Senator or Representative should be admitted from the eleven States deemed to be in rebellion. President Lincoln would have interpreted the Constitution likewise in the matter of a joint resolution he signed in February of 1865, to the effect that certain States were not entitled to Presidential electors, because they were then in rebellion. Lincoln told Congress he thought his signature unnecessary, as by the Constitution Congress had exclusive authority to count the electoral vote. However, except in a few instances in early Congresses, all joint resolutions except those for constitutional amendments have been sent to the President for signature.

Methods of escaping the strict letter of the Constitutions have not been confined to the legislative branch. Avoidances on the part of the Executive are also to be found. In various States it

is not at all uncommon for the Governor to suggest in the case of some bill sent to him, that it be withdrawn, nominally for the purpose of amendment, but really that it may be allowed to die a peaceful death, without the notoriety of a veto and the harm to personal or party fortunes that therefrom might result

#### SIGNING BILLS

Divers and diverse are the constitutional details about the signing of bills, the failure to sign, and their return. Little profit would come from rehearsing them. Classified, they show that the Governors have from three to ten days for signing while the Legislature is in session, five being the number preferred by nearly half the States. Importance begins after adjournment. Massachusetts started the trouble by overlooking or ignoring the fact that a Governor might not want to make up his mind until after an adjournment coming within five days from the time the bill had been presented to him. What happened then? If he disapproved a bill, how could he return it to legislators who had gone home? If they had merely taken a recess for a week or more, did that make any difference? In 1791 the Senate asked the Supreme Court its opinion and the Court replied to the effect that if the adjournment was final, if there was to be no subsequent meeting, the unsigned and unreturned bill did not have the force of law, if, however, the adjournment had been only for the purpose of a recess, the contrary was the case. Thirty years later a constitutional amendment followed the language that had been used in the Federal Constitution, which had set forth that if adjournment prevented return of a bill, it would not be a law.

The Federal provision raised no question for forty years and more. Then Henry Clay at the very end of a session got through Congress a bill about the distribution of the proceeds of sales of public lands. The President did not dare to return it, for the votes indicated it would be passed over his veto. So he put it in his pocket, figuratively speaking, and then for many months was abused by his enemies from one end of the country to the other for his "pocket veto." Clay even maintained the Constitution had been violated by this insolent treatment of Congress. Possibly the outcry made Presidents following Jackson hesitate about using the power. Exhaustive research of the governmental archives in 1928 disclosed only eleven pocket vetoes up to Lin-

coln's time. Since then such vetoes have been frequent. All told more than 400 of them have been found <sup>1</sup>

Nearly three quarters of the bills thus killed reached the President just before the final adjournment that came March 4 every other year. They have aroused no question. Evidently the President could not return a bill to a non-existent House, and though the Senate is for some purposes treated as a continuing body, nobody has pressed that point in this connection. Dispute arose over one of the 119 bills (and perhaps more) that up to 1928 had been sent to the President just before what for want of a better name has been called an interim adjournment, that which takes place at the end of what is usually "the first session," although it may be a second or third session, in exceptional times when a Congress has three or four sessions in the course of its two years. In 1926 an Indian bill passed both Houses, reaching the President less than ten days before adjournment of the first session of the 69th Congress. He neither signed nor returned it, and it was not published as law. In the next session the House Committee on the Judiciary was asked to advise the House in the matter, and unanimously reported that the bill had become law. Soon afterward the question was taken before the Court of Claims, which decided the other way. Then it was carried to the Supreme Court, which upheld the Court of Claims <sup>2</sup>

The Supreme Court found such a conflict of opinion in various decisions of State courts on the same subject that they gave no substantial aid. Therefore reaching independent conclusion, it held that a bill must be returned while Congress is in session, return at other times to an officer of the House not sufficing; that the ten days allowed the President are calendar and not legislative days, that the determinative question in reference to an "adjournment" is whether it is one that "prevents" the President from returning the bill within the time allowed; and that long acquiescence by Congress in the practical construction given by Presidents to the constitutional provision concerned, while not absolutely binding on the judicial department, was entitled to great regard.<sup>3</sup>

<sup>1</sup> *Message from the President*, Doc No 493, H of R, 70th Cong, 2d Session.

<sup>2</sup> *Okanagon, etc, Indian Tribes v United States* 279 U S 655 (1929)

<sup>3</sup> For full list and description of pocket vetoes up to October 10, 1928, see House Doc 493, 70th Congress, 2d session, a report to President Calvin Coolidge, by Robert P Reeder of the Department of Justice



Two years later the Supreme Court of Michigan treated this finding somewhat cavalierly<sup>1</sup>. The brushing aside of opinions by Justices of State courts was met by saying "The weight of State authority seems to be that it is only the final adjournment of the Legislature which prevents return of a bill on veto, and that a temporary adjournment does not." Then the Court squarely rejected the Okanagon decision "because it would introduce into what was designed as a simple, practical, and definitely operating provision for executive approval of bills, an element destructive of such constitutional power." Temporary adjournments of the originating branch or of the whole Legislature would deprive the Governor of his rights. However, by determining that a President may use the pocket veto, the Supreme Court has undoubtedly ended the controversy as far as it concerns Federal legislation, and the weighty authority of the Court will presumably end it in States using the same or essentially the same language as that of the Federal Constitution.

There remained unsettled the reverse problem: May President or Governor approve a bill after adjournment?

In the course of Monroe's administration one of forty or fifty bills before him on the evening before the close of a session remained accidentally without signature, although its signing was announced. Wirt and John Quincy Adams thought the President could sign although Congress was not in session. Calhoun held to the contrary on the ground of uniform practice in construction of the Constitution. The matter not being urgent, it was concluded safest to leave the Act unsigned.

President Lincoln signed the Abandoned and Captured Property Act March 12, 1863, eight days after adjournment. In June of the following year the House Committee on the Judiciary unanimously reported its opinion that the Act was not in force, having been signed too late, but Congress took no steps to re-enact the measure, and in *U S v Alice Weil*, 29 Ct Cl 523 (1894) the validity of an Act that had been signed in the course of a recess was upheld largely on the ground that the constitutionality of the measure signed by President Lincoln had never been questioned. These solitary instances of signature by a President after adjournment had been almost forgotten when in June of 1920 Attorney General Palmer advised President Wilson that he might take ten days in which to sign belated bills, and

<sup>1</sup> *Wood v State Administrative Board*, 255 Mich 220 (1931)

accordingly Mr Wilson approved eight measures that the members of the 66th Congress, going home at the end of the second session, had not supposed could become law.<sup>1</sup> President Coolidge did likewise in the case of a measure that he had not signed before adjournment of Congress in July, 1926

As far as Federal legislation is concerned, there remains no doubt that the President may sign bills in the course of a recess, the Supreme Court having justified this in a case where signature took place while Congress was absent for the Christmas holiday period.<sup>2</sup> Also it has now been established that he may sign after an adjournment *sine die*<sup>3</sup> Chief Justice Hughes in giving the opinion held that the reasoning in the *La Abra* case applied with as much force whether the adjournment had been after a recess, at the end of a session, or final. Incidentally it is to be noticed that he said. "The President acts legislatively under the Constitution but he is not a constituent part of the Congress"

When Franklin D Roosevelt became President, it had not been customary to give Congress reasons for use of the pocket veto. Mr Roosevelt thought the custom unwise. On the last day of the second session of the 73rd Congress, in 1934, he sent to the Senate and gave to the press a statement of his reasons for not signing fifty-three bills, explaining this course by saying "The President has desired to take a more affirmative position than this, feeling that in the case of most legislation reasons for definite disapproval should be given" <sup>4</sup>

New York in 1821 had copied the Federal veto provision word for word, except for the substitution of "Legislature" for "Congress." Through more than thirty-five years everybody supposed this precluded the Governor from signing after adjournment. Then, in 1837, Governor Young signed two bills after the Legislature adjourned, and they were not questioned. In 1852 six bills were so signed, and from 1854 the practice became general. In June, 1860, the Court of Appeals sustained it and the decision took so wide a scope as to give the Governor authority to approve a bill at any time in the course of the recess <sup>5</sup> The harm of

<sup>1</sup> 32 Op Atty Gen 225

Also see Lindsay Rogers, "Power of the President to Sign Bills," *Yale Law Journal*, Nov., 1920

<sup>2</sup> *La Abra Silver Mining Co v United States*, 175 U S 423 (1899).

<sup>3</sup> *Edwards v United States*, 286 U S 482 (1931).

<sup>4</sup> *Congressional Record*, 73rd Cong., 2d Session, p. 12, 456

<sup>5</sup> *People v Bowen*, 21 N Y 517.

this was discussed in the Convention of 1867. Governor Fenton had suggested that the time for signing be limited to thirty days. A proposal for ten days was rejected and no definite stand was taken on the thirty-day limit. In 1874, however, by amendment the thirty-day limit was imposed. It has been computed that before then 3162 bills had been signed after adjournment.

More than two thirds of the States now specify a period of anywhere from three to thirty days in which the Governor may sign after adjournment. This is wholly inconsistent with the theory of the veto, to my mind the logical theory, which does not make the Governor the third branch of the Legislature, but for the sake of expediency simply gives him the power to demand that the Legislature shall for a second time consider measures which seem to him needing reconsideration. Except in the half dozen States where a veto after adjournment is to be submitted at the next session, refusal to sign after adjournment is the absolute veto with which our fathers would have nothing to do, save in the temporary case of South Carolina, where after two years the obnoxious provision was discarded. Perhaps that, however, is bloodless theory. There is strength in the rejoinder that the absolute veto is not of grave importance, in view of the few bills passed in any case over the Governor's disapproval.<sup>1</sup>

A more serious objection to opportunity for executive action after adjournment is that it forfeits the stimulus to prompt work by legislators which springs from knowledge that they are not to go home until the work has been finished — including signing, vetoing, votes on vetoes, the whole process of concluding decision. Anything that encourages legislators to crowd work into the last days of a session is unfortunate. The evil is nothing new. Just as George Washington was going out of office he wrote to Jonathan Trumbull, March 3, 1797.

"When I add, that according to custom all the acts of the session, excepting two or three unimportant bills, have been presented to me within the last four days, you will not be surprised at the pressure under which I write at present. But it must astonish others, who know that the Constitution allows the President ten days to deliberate on each bill, which is brought before him, that he should be allowed by the legislature less than half of that time to consider all the business of the session; and,

<sup>1</sup> John A. Fairlee, "The Veto Power of the State Governor," *Am. Pol. Science Review*, August, 1917, p. 491.

in some instances, scarcely an hour to revolve the most important. But as the scene is closing with me, it is of little avail now to let it be with murmurs "

When Jackson aroused Clay's wrath, there were about ninety bills on which Jackson had to pass judgment on the last day of the session. Congress continues to tax in this way the strength of the President and his advisers. In the Edwards case Chief Justice Hughes called attention to the fact that between February 28, 1931, and noon of March 4, 269 bills were presented to the President for his consideration, 184 of which were presented to him in the last twenty-four hours of the session. This the Chief Justice used to buttress the opinion of the court. "Regarding," he said, "must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him." Further. "No public interest would be conserved by the requirement of hurried and inconsiderate examination of bills in the closing hours of a session."

The situation is worse in many of the States. In the case of *Johnson v. Luers*, 129 Md. 521 (1916), the Governor of Maryland testified that about 500 bills were passed in the last two or three days of the session. He had to have recourse to the subterfuge of asking the Clerks of House and Senate to hold them, delivering to him only as fast as he could get through them, to meet the constitutional requirement of signing within six days of presentation. This the court did not frown upon. In Iowa nearly one half of all the laws passed by the 33rd and 34th General Assemblies were signed by Governor Carroll after the adjournment of the Houses. Governor Dunne of Illinois told the Governors' Conference of 1913 that three quarters of the bills in his State were passed in the last ten days of the Session. Of 996 bills that passed both Houses of the California Legislature of 1915, about 850 were upon adjournment left in Governor Johnson's hands for consideration. In the last ten days of the New York Legislature of 1917, 565 bills were hurried through the two Houses.

This not only conduces to bad lawmaking, but also it is grossly unfair to Governors. One of them, Emmet O'Neal of Alabama, undoubtedly voiced the sentiments of them all when he said "With the limited time allowed by most State Constitutions for the exercise of the veto power, it is utterly impossible for the

Governor of the State, with his other important duties, to give proper scrutiny, examination, and consideration to this large body of bills that pour into his office at one time." One result has been to drive some Governors to a course never contemplated by those who put the veto system into our Constitutions. The work is so great that no Governor can well do it single-handed. He must have the help of advisers, and often rely on them implicitly. The legislators who wrote the measures and know all about them, have gone home and usually cannot be consulted. The result is virtually an additional legislative procedure. In New York in May of 1915 it was announced that for the first time in the history of the State, the Governor would conduct a series of open hearings on the money bills before him, which any taxpayer of the State would be privileged to attend and at which the heads of each of the State departments would be called upon to explain in detail every item for which a request had been made. The heads of all the thirty-two State departments were to be called in turn and asked to explain everything contained in the money bills affecting their departments.<sup>1</sup>

Governor George F. Shafroth of North Dakota, addressing the Governors' Conference of 1931, urged longer time for the Governor to consider bills after adjournment, and also said if he had his way about it he would eliminate the pocket veto from every Constitution in the United States. He thought that if a bill did not meet with the approval of the Governor, he ought to have to file his objections and take the responsibility.<sup>2</sup>

Grave objections presenting themselves to expansion of the veto process that makes Chief Executives to some degree a third branch of the lawmaking department, it is to be considered whether better remedy for palpable defects may not be found in giving President and Governors more time for the study of bills without depriving Senators and Representatives of the right to give a second consideration to questioned measures and to have their judgment prevail when expressed by a vote of two to one. This can be accomplished by ensuring to President or Governor more time for consideration before adjournment instead of letting him do the work after adjournment. In 1873 President Grant in his annual message recommended "there should be no legislation in Congress during the last twenty-four

<sup>1</sup> Albany, N Y, *Knickerbocker Press*, May 4, 1915

<sup>2</sup> Supp. to the *U S Daily*, June 8, 1931, p 16

hours of its sitting except upon vetoes, in order to give the Executive an opportunity to examine and approve or disapprove bills understandingly." Lamentably enough this appeal for even a single day of relief fell on deaf ears

Some of the States have had more pity on their Executives and have shown more commonsense. Here and there a Governor gets a day or two of protection against delayed passage of all kinds of bills and a few States compel the Legislature to give him at least five days to study money bills.<sup>1</sup> The Commission that submitted a preliminary draft for revising the Constitution of Pennsylvania, February 11, 1920, embodied in it a provision that final adjournment of the General Assembly should not take place until ten days after the appropriation bill had reached the Governor. To let a Governor have that much time on other bills would leave the lawmakers nothing to do meanwhile save to sit idly waiting for vetoes. In Illinois they have tried to meet that difficulty by having the General Assembly take a recess, but according to a bulletin compiled for the Constitutional Convention of 1919, when the Assembly reconvenes to hear the veto messages, a quorum is practically never present, so that a veto cannot be overcome, nor can advantage be taken of suggestions the Governor may have made for the improvement of legislation.

Not alone should Executives be relieved, but also legislative branches should have more time for deliberation. The practice in Congress is one of the defects of its procedure. Ordinarily the constitutional provision about vetoes, that the House receiving the message shall "proceed to reconsider," is construed to call for action at once, and often there is not even debate. This is unfair both to the President and to the House. That it is not in reality a constitutional necessity, is shown by the fact that occasionally and without question a veto message is referred to a committee, which may or may not ever report. Delaware and New Jersey do wisely in forbidding the passage of a bill over a veto on the day of its return.

Definition of "days" in veto provisions has aroused controversy. In the last week of the Federal Convention, when the tired delegates, anxious to go home, gave scant consideration to further proposals of amendment, Madison moved to insert "the day on which," in order to prevent question as to whether the

<sup>1</sup> Robert Luce, *Legislative Assemblies*, 159

day on which a measure be presented ought to be counted as one of the ten days allowed to the President for consideration. Randolph seconded the motion, but Gouverneur Morris declared it unnecessary, saying, "The law knows no fraction of days." According to Madison, "a number of members being very impatient, and calling for the question," three States voted with him and eight against

Happier circumstances might have saved a good deal of litigation, for undoubtedly a construction set forth clearly in the Federal Constitution would have been universally accepted. The earlier English rule of interpretation was that where computation is to be made from an act or happening, the day of the act or happening is to be included, but in the later English cases this has been reversed. Exclusion of the day of the act or happening has been the rule adopted by the Supreme Court of the United States and in most of the States, though a few follow the earlier construction. In the matter of the veto the decisions have all been to the effect that the day of presentation is to be excluded and the last day of the prescribed period included. Anybody wishing to follow back the cases, may begin with the latest at this writing, *Ella Lewis, Secretary of State, et al v B. B. Cozine et al*, Kentucky Court of Appeals, June 13, 1930<sup>1</sup>

Connecticut in 1929 learned the grave importance of strict compliance with constitutional requirements in these matters. Up to ten years before then Governors had for many years been accustomed, with few exceptions, to sign bills within three days after adjournments, but through the last decade they had construed the provision, "three days, Sundays excepted, after it shall have been presented to him," to let them take as much time as they wished by delaying the actual presentation. A citizen saw fit to question the constitutionality of an act signed nineteen days after adjournment and was sustained by the court.<sup>2</sup> This cast doubt on the validity of 1492 bills that in the last ten years had been signed more than three days after adjournment, and a score previously so signed, including criminal laws under which it was said more than a thousand persons were suffering imprisonment. The gravity of the situation led to the speedy calling of a special session of the Legislature, which by the passage of six bills in a single day (August 6, 1929) vali-

<sup>1</sup> Printed in full in *U S Daily*, June 25, 1930

<sup>2</sup> *State of Connecticut v John J McCook*, 109 Conn 621 (1929).

dated the enactments in doubt. The court had held that ten years was too short a period in which to predicate a settled and established practice of weight in interpreting a constitutional provision. Furthermore, it believed a contrary view in this instance necessarily led to the conclusion that there was no specified time in which the Governor must sign bills in order to make them laws, and this would be intolerable.

### PARTS OF BILLS

A feature of the veto that probably received no thought whatever from the framers of our early Constitutions relates to the matter of entirety. When the States began, bills were for the most part short and simple. Doubtless it was not foreseen that a great increase in the complexity of social relations would reflect itself in laws, reaching the point where it would be of real importance for a Governor to be able to object to parts of measures without refusing his approval to the rest. The harm done by the lack of this power first became conspicuous in Congress, for it was speedily discovered that the easy way to compel the President to approve something obnoxious to him was to attach it to something imperative, or seemingly such, like an appropriation bill. Sometimes he has been forced, greatly against his will, to submit or else have the wheels of government completely blocked. On at least one occasion so brave a man as Theodore Roosevelt did not venture to reject an appropriation bill containing certain items he did not like. On the other hand notable instances of courageous revolt were given by the vetoes of President Hayes. In the summer of 1919 President Wilson vetoed two of the great appropriation bills because of particular objections.

The dangers of the situation had become so well known when experienced statesmen drew the Constitution for the Confederacy, in 1861, that they provided for the veto of items in appropriation bills. This made the idea familiar in the South, and when Georgia (1865) and Texas (1866) took a fresh start, they put it into their new Constitutions. West Virginia copied it in 1872, and then it took on impetus with adoption by Pennsylvania (1873) and New York (1874). All the States admitted since the Civil War have come in with it and it has been adopted by older States until now it is found in more than three quarters of the whole number. New England, where legislative troubles are least, has been slowest in approving the device. Massachu-



setts came to its acceptance in 1918 when providing for a budget. The New Hampshire Conventions of 1912 and 1920 recommended it, but each time the amendment failed at the polls, the vote in 1912 being 17,942 for and 9325 against, in 1920, 45,634 for and 26,195 against, not the required two thirds. The chances are that it was defeated because of want of comprehension of its nature on the part of the voters, rather than because of deliberate opposition.

Congress would seem to have approved the idea when in 1916 in a bill providing autonomous government for the Philippines it gave the Governor-General the right to veto items in appropriation bills, and it did the same thing for Porto Rico. Yet it has paid no attention to the more than seventy proposals presented to it for amendment of the Federal Constitution to accomplish the purpose. In 1873 President Grant went farther by advising an amendment that would let the President disapprove part of "any measure," but no action followed.

It cannot be gainsaid that there are two sides to the question. The use of the right to veto items of appropriation bills may indeed help the correlating of income and outgo, as well as the distributing of expenditure with a regard to proportion, that many nowadays think should and will be achieved by a unified financial programme, a budget. On the other hand distinct injuries follow. The great power given to the Governor may be used by him to advance party ends or build up a political machine. He may wield it to make political capital by vetoing items that will be little understood by the electorate, though meant for purposes deemed of much importance by the experts who knew all the facts. The temptation is great to cut appropriations arbitrarily in order to make a record for economy. Where veto after adjournment is possible, it can too easily be used to reward or punish.

At the same time the Legislature is tempted to relax its vigilance. Many items may be sent up with the expectation that the Governor will cut them out. When we read that in 1910 Governor Hughes of New York vetoed about five million dollars of items in appropriation bills, and in 1911 Governor Dix five and a half millions, we do not know whether it was because of legislative indifference or the Governor's carefulness. The chances are these items were largely for purposes meant to bring local glory to some individual members who knew the projects

were unwise or untimely, but pushed them along in the confidence that the Governor would protect the treasury, while the members would get the credit of having tried to benefit their constituents. Also the system contributes to the procrastination that piles up a vast volume of business for the last few days of the session. Incidentally it may tax seriously the time of the legislative branch. Representative W. F. Stevenson told the Federal House, December 11, 1918, that in his State of South Carolina he had seen the Governor veto 160 items in one appropriation bill, and the roll-calls thereby compelled took four days, resulting in the passage of every item over the veto.

Still another objection is the burden imposed upon the Executive. If the friends and foes of every item in the great appropriation bills of the Nation should have the chance to bring pressure to bear on the President, the inroads on his time and strength might become intolerable. President Taft brought another phase of this to the attention of the New York Constitutional Convention June 10, 1915. "I have had my doubts as to the wisdom of having the President veto items in an appropriation bill. The President has a good deal of power anyhow, and there are a good many items in an appropriation bill. There are a good many items in which Congressmen are personally interested, and I don't think that is a good way to increase that power of the President. I think it might give him too great power."<sup>1</sup> Later in the same year, speaking at Columbia University, he expressed like doubts, saying that the change would greatly enlarge the influence of the President, already large enough from patronage and party loyalty; and that he was inclined to think it better to trust the people to condemn the party responsible for abuse than to give such a powerful instrument as this as a temptation to sinister use by a President eager for continued political success.<sup>2</sup> Experience in Washington changed the view of the matter taken by John J. Fitzgerald of New York, who became Chairman of the House Committee on Appropriations. He told the New York Constitutional Convention committee that he went to Congress contemplating bringing in an amendment giving the President the right to veto items, but a little experience led him to drop the idea.

Doubts by such men ought of course to have weight, but it is

<sup>1</sup> N Y Conv Doc No 11, p 28

<sup>2</sup> *New York Times*, Oct 13, 1915

clear that the other view is entertained by an overwhelming majority of American students of government. Furthermore, test of the matter in the States has justified the practice in at least the judgment of the Executives. Urging in 1919 (October 22) a Federal amendment, Representative W. W. Hastings of Oklahoma said he had made inquiry of the Governors of all the States where the item veto was used, and not one of them had reported otherwise than favorably. However, had he consulted thoughtful members of the Legislatures, the testimony might have been different.

If a Governor may veto an item in an appropriation, may he veto part of an item? In other words, may he cut an item? The question has reached the courts. In May of 1889 the Governor of Pennsylvania approved an appropriation for public schools to the extent of ten million dollars and disapproved one million. In his message he admitted that the right to disapprove part of an item was doubted, but he followed precedents set by several of his predecessors. The court held that the veto power extended not only to each subject but also to each amount, and therefore that the Governor was within his right in reducing an amount. Emphasis, however, was laid on the familiar principle that a frequent practice acquiesced in for a number of years must be very clearly shown to be unconstitutional before the courts will be justified in declaring against it.<sup>1</sup> The Commission to recommend changes in the Constitution advised (Feb. 11, 1920) a change in phraseology in this particular that would remove any doubt.

The Supreme Court of Oklahoma has held that in the case of a bill containing only one item of appropriation (for the support and maintenance of the State University), the Governor had no right to approve the bill in part and disapprove other parts that directed how the funds appropriated should be apportioned.<sup>2</sup> The Court, however, distinctly said it was not necessary to determine whether the Governor might reduce an item. That question was squarely met in *Fergus v. Russell*, 270 Ill. 304, 348 (1915), the Court holding that the power given to the Governor to veto an item in an appropriation bill did not permit him to veto part of an item. The ground taken was that it would be legislation by the Governor, an invasion of the functions of the

<sup>1</sup> *Commonwealth v. Barnett*, 199 Pa. St. 161 (1901).

<sup>2</sup> *Regents of the State Univ. v. Trapp*, 28 Okla. 83 (1911).

legislative department The Court agreed with *State v. Holder*, 76 Miss 158, and differed from *Commonwealth v. Barnett*. There have now been decisions to like effect in at least a dozen States

If the Constitutions have not in fact given the power to reduce items, should they be so changed as to give it? Governors Whitman of New York, Dunne of Illinois, and Eberhart of Minnesota have been among those thinking that should be done A constitutional amendment to such an end was submitted to the people in Minnesota in 1916 but failed to carry, which however does not signify popular disapproval, for Minnesota is one of the States shackled by the requirement that amendments shall get a majority of all voting at the election.

The importance of the item veto has lessened since budget systems came into vogue Now there is rarely great need of it save for its original purpose, which was to prevent appropriations unconstitutional or otherwise improper Question of expediency was a secondary development which with improvement in methods of public finance is no longer so often to be raised.

In logic there is no reason why an appropriation bill should be the only sort of a bill open to the veto of a fraction It was urged in the New York Convention of 1867 that the Governor's power should be extended to reach any section of any bill Delegate Folger objected that this would make the Governor an affirmative lawmaker, in that he could accept part of a measure The proposal was rejected Washington was the first State to look on it with favor, putting it into the Constitution with which she entered the Union (1889) Governor Ernest Lister of that State, writing to me in March, 1917, said "I feel that this provision is wise, in that it enables the Governor to hold a strong check on legislation The power has been used by me on numerous occasions, especially in relation to appropriations and indiscriminate use of emergency clauses, and I may say that good results have followed to the State from its use I have often felt that the power could be broadened to good advantage, giving the Governor power to veto portions of a section or to reduce appropriation items It is possible, however, that so doing would be to place too much power in the hands of the Chief Executive "

South Carolina in 1895 imitated Washington Ohio followed the example in 1903, but in 1912 restricted the Governor's

power in the matter to items in appropriation bills. There was little debate on the subject in the Convention that made the change. Henry W. Elson in defending the provision as it had stood, said the corrupt practices act, in his view one of the best in the country, would have been absolutely worthless and unworkable but for the veto of one or two items.<sup>1</sup> Nevertheless the provision was summarily discarded. Apparently it was one of those cases where almost by accident a step of importance is taken without appreciation of its significance.

The need for some solution of the difficulty is particularly felt in the States that permit the Governor to sign bills after adjournment. Governor Stewart of Montana laid before the Governors' Conference of 1914 one aspect of what now takes place. "The subject matter of the measure may be all right," he said. "It may involve a principle that is right and should be carried into effect, but the jobbers at the last minute attach to it some condition or some sort of provision that is inexpedient and may be absolutely wrong. This places the Governor in a hard position. For instance, the general proposition involved is the only thing that is known to the people. They know, for instance, that a bill creating a railroad commission, we will say, has been passed by both Houses of the Legislature in accordance with the platform pledge of the party, and it is put up to the Governor. He can either veto it or approve it. The Legislature has adjourned, the members have gone. There may be pernicious provisions in that bill that the people themselves would not want enacted into law if they knew about them. But they do not understand those things."<sup>2</sup>

As a remedy C. Z. Lincoln has suggested something in the nature of a compromise between what might be called the all-or-nothing system and the unrestricted veto. He points out that the Legislature, by passing bills and leaving them for the Governor's action (after adjournment), in effect simply recommends that the bills become laws, for they cannot become laws without the Governor's approval. If the Legislature had continued in session, the Governor might have called its attention to defects in a bill, and, either by suggesting recall of the bill, or by veto, might have procured its amendment. This opportunity to perfect a bill is not continued after adjournment, and the Governor must either assent to, or reject, the bill as a whole. In

<sup>1</sup> *Proceedings and Debates*, 1, 568

<sup>2</sup> *Proceedings*, 225

numerous instances the Governor might perfect a bill by eliminating objectionable provisions without affecting its general character; and this would save the time of the Legislature at subsequent sessions in making needed amendments, or of the courts in construing separate provisions whose constitutionality is questioned.

"I think," says Mr. Lincoln, "the Convention of 1867 was right in refusing to permit the Governor to veto separate parts of a bill while the Legislature is in session, because the Legislature, being the lawmaking power of the State, should, while in session, perfect its own bills; but the same reason does not apply where the Legislature, without waiting for the Governor's action on a bill adjourns and deprives itself of any further power over the bill, and declines any further responsibility concerning it. If the Governor is to be held responsible for legislation approved by him during the thirty-day period, he ought to have power to correct a bill, not by adding new matter, but by excluding objectionable provisions" <sup>1</sup>

#### WHAT IS A "LEGISLATURE"?

The intermingling of the powers by the veto has given rise to controversy over their limitations and as a corollary thereto over the meaning of the word "Legislature" as used in our Constitutions. The Federal question rose early in a case in which the plaintiff in error contended that the Eleventh Amendment was invalid because it had not been passed upon by the President <sup>2</sup> The Court rejected this contention. Justice Chase said the negative voice of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the Constitution. Somebody forgot this in the troubled times that followed the Civil War. Proposal of an amendment passing both Houses of Congress, relating to the extinction of slavery, was sent to the President. Discovering the error, Senator Lyman Trumbull moved and the Senate resolved it had been inadvertently done, that it was inconsistent with former practice, that the President's approval was unnecessary, and that the Secretary be instructed not to communicate to him notice of the approval by Congress.

Some of the State Constitutions distinctly say the veto shall

<sup>1</sup> *Constitutional History of New York*, II, 343

<sup>2</sup> *Hollingsworth v. Virginia*, 3 Dallas (U S) 378.

not extend to constitutional amendments, in others the courts have generally held them excepted by implication. The matter came up in *Commonwealth v. Griest*, 196 Penn. 396 (1900). It had been held by the lower court that an amendment to the Constitution proposed by joint resolution of the General Assembly should be submitted to the Governor for his approval or veto, and as a proposed amendment had been vetoed by Governor Stone, it could not be voted upon by the people. The Supreme Court, however, after a careful examination of the question, decided this position was incorrect. The action of the Legislature in proposing an amendment to the Constitution is "Constitution-making," and is not the exercise of the legislative power.

This was an interpretation of a State Constitution. How about the Federal Constitution?

That question became acute with the spread of the Initiative and Referendum. Might the ratification of an amendment to the Federal Constitution be submitted to the people of a State?

The courts faced the problem first in 1919, when the ratification of the prohibition and woman suffrage amendments aroused sharp controversy. The Governor of Maine asked the Justices their opinion. They gave it to the effect that the referendum could not be applied.<sup>1</sup> They held that the Congress in proposing amendments did not, strictly speaking, act in the exercise of ordinary legislative power, but was acting in behalf of and as representative of the people of the United States. The people had unreservedly surrendered to Congress all authority over that subject matter. "If a subsequent Legislature cannot rescind the ratification by a former Legislature, it would seem that much less could such ratification be rescinded by the subsequent vote of the people."

In that same year the courts of Washington and Ohio took the opposite view. That of Washington construed the word "Legislature" as used in the Federal Constitution to be equivalent to "the legislative power" and supported the exercise of that power by the people through the referendum.<sup>2</sup> The opinion of the Ohio court to the same effect has been previously cited.<sup>3</sup> This was the case that brought the question to the

<sup>1</sup> Opinion of Justices, 118 Me. 544 (1919)

<sup>2</sup> *State v. Howell*, 107 Wash. 167 (1919)

<sup>3</sup> Robert Luce, *Legislative Principles*, 120.

Supreme Court of the United States, where Mr Justice Day, in delivering the opinion, said the only question was what the framers of the Constitution meant in requiring ratification by "Legislatures" <sup>1</sup> "That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people" So the referendum could not be applied and the judgment of the Ohio Court was reversed. This view was promptly approved by the courts of three other States, Colorado, California, and Michigan, and its doctrine may be taken as definitely established <sup>2</sup>

Nevertheless the last word as to what "Legislature" means had not been spoken. The question was to become even more acute after Congress passed the apportionment act of June 19, 1929. In several States the Governor was not of the same political faith with the majority of his House and Senate. Strong partisan motives impelled those controlling the two bodies to try to redistrict their States to political advantage, which the Governors could prevent if they might veto. So the argument was advanced that the Federal Constitution gave them no part in the matter. Section 4 of Article I reads

"The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the place of choosing Senators"

Lawyers hunted through the pages of constitutional and legislative history to find how this had been interpreted. They discovered little help in the way of precedent. Some thought it significant that when the Massachusetts General Court in 1788, 1794, and 1812 passed Acts for dividing the Commonwealth into districts for the choice of Representatives in Congress, no notation of approval by the Governor appeared on the records, the Act of 1814 being the first one recorded as submitted to and approved by him. Whether or not the first course in Massachusetts had in fact been otherwise, for the Governor to take a part

<sup>1</sup> *Hawke v Smith*, 253 U S 221 (1919)

<sup>2</sup> *Prior et al v Noland*, 68 Colo 263 (1920)

*Barlotti v Lyons*, 182 Cal 575 (1920)

*Decker v Sec of State*, 209 Mich. 565 (1920).



became the general practice throughout the land. Question of it seems not to have been raised in Congress until 1842 when the Senate Judiciary Committee proposed to an apportionment bill an amendment providing that the election in each State "shall under the laws thereof be made by districts." This was defeated by forty to four, but as the report of the debate discloses no reference to that phrase, "the laws," inference from its use is questionable.

In 1910 the South Dakota court held that "Legislature" as used in this connection in the Federal Constitution "does not mean simply the members who compose the Legislature, acting in some ministerial capacity, but refers to and means the law-making body of the power of the State, as established by the State Constitution, and which includes the whole constitutional machinery of the State."<sup>1</sup> The question was over a re-districting measure, and may have been what led Senator Burton, of Ohio, to secure in Congress the year afterward adoption of an amendment to an apportionment bill, changing "by the Legislature," as it came from the committee, to "by the laws of the State." The purpose of the change was to meet the situation in those States that had adopted the Referendum, Ohio among them. Whether the part of the Governor was thought of, does not appear. However, from that point of view the amendment seems to throw no more light on this particular question than did the action of Congress in omitting the provision when next an apportionment bill was passed, in 1929.

In 1930 the Supreme Court of Washington held that a State apportionment act was a "law" and could be initiated by the use of the Initiative and Referendum,<sup>2</sup> but that also did not bear, at least directly, on the question of the Governor's part.

As soon as the census figures of 1930 were available as a basis for action under the apportionment law of 1929, in the States where the Governor and his Legislature were at odds the dispute became lively. In the courts the Minnesota controversy took the front place. The Constitution of that State had said: "The Legislature shall consist of the Senate and House of Representatives." The Governor vetoed a reapportionment bill. Thereupon the House of Representatives passed a resolution ordering the bill to be filed with the Secretary of State as a part

<sup>1</sup> *Schrader v Polley*, 26 So. Dak. 5 (1910).

<sup>2</sup> *State ex rel. Miller v Hinkle*, 156 Wash. 289 (1930).

of the permanent records of his office, and the Secretary so doing treated it as valid legislation and received the filing fee of a candidate from one of the new congressional districts.

This was contested in the Second Judicial District, where Judge Gustavus Loevinger upheld the reapportionment, with a memorandum long, learned, and able, thoroughly discussing the history of the law in the matter.<sup>1</sup> The Minnesota Constitution had said without qualification: "The Legislature shall consist of the Senate and House of Representatives." The Judge thought it would be a clear and indefensible act of judicial legislation if the court should construe the word "legislature" in the enlarged and comprehensive sense of "the State." This view was upheld by the Supreme Court of Minnesota, which declared the ordinary meaning of the word in issue to be the Senate and House, the representative body that makes the laws of the State, "and of which the Chief Executive is not a part, although he has a limited restraint upon the enactment of State laws." The court admitted that "perhaps the veto power is a legislative power," but it declared "the frequent expression that our State, like the Nation, has three branches of government, executive, legislative, and judicial, is seldom, if ever, understood as meaning that the Governor is part of the legislative."<sup>2</sup>

In New York the Supreme Court reached just the opposite conclusion.<sup>3</sup> It quoted approvingly what Mr. Justice Day had said in *Hawke v. Smith*<sup>4</sup> to the effect that when the Federal Constitution was framed a Legislature was the representative body that made the laws of the people. Also it laid stress on the implications of the word "prescribe" in the article of that Constitution here involved, holding that the grant of the power to prescribe meant that the Legislature will so do by the exercise of the legislative power, and it gave weight to the usage of nearly a century and a half.

When the Minnesota and New York cases reached the United States Supreme Court, together with a like case from Missouri,<sup>5</sup>

<sup>1</sup> *Regulations of the Legislatures of Certain States prescribing Congressional Districts — and Decisions of the State Courts of Illinois, Minnesota, and New York*, compiled by William Tyler Page and printed by Congress as a public document, 1931.

<sup>2</sup> *Smiley v. Holm*, 184 Minn. 288 (1931).

<sup>3</sup> *Koenig v. Flynn*, 258 N. Y. 292 (1931).

<sup>4</sup> Cited *ante*.

<sup>5</sup> *Carroll v. Becker*, 329 Mo. 501 (1932).

the opinion by Chief Justice Hughes was addressed to the Minnesota case,<sup>1</sup> with the other two cases decided on the same grounds. He agreed with the New York court as to the inference to be drawn from "prescribe," and likewise dwelt on practical construction, brushing aside the alleged early Massachusetts precedent. Distinguishing *Hawke v. Smith*,<sup>2</sup> he held that in the present instance the function rather than the nature of the representative body was in issue. Recognizing that the Constitution gives to legislatures different functions, he concluded the function here involved to be that of making laws, by reason of the subject matter and the terms of the provisions as to the "times, places, and manner of holding elections." Furthermore he pointed out that the constitutional requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. Thus he held to involve lawmaking in its most essential features and most important aspect. Admitting that the Constitution of a State might determine how its laws should be made, in the absence of an indication of a contrary intent the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments.

This seems to have established that what we commonly think of as "the Legislature" may not by itself re-district States.

<sup>1</sup> *Smiley v. Holm*, 285 U. S. 355 (1932).

<sup>2</sup> Cited *ante*

## CHAPTER VII

### PRESIDENT AND CONGRESS

WITH the first President came the problem of his relations with Congress and the beginning of that struggle between Executive and Legislative which has played so great a part in the political history of the Union. It is worth while noting how the pendulum has swung back and forth.

Washington both asked and worked for the legislation he thought necessary, and his influence with Congress was conspicuous. On the other hand he did not hesitate to resist encroachment by the lawmaking branch. When the House called upon him to transmit to it papers relating to the Jay treaty, in refusing (March 30, 1796) he said "It is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved." As the assent of the House was not necessary to the validity of the treaty and as the papers called for had no bearing on any legislation "a just regard for the Constitution and to the duty of my office. . forbids a compliance with your request."

John Adams wielded slight personal authority over Congress. His democratic successor, Jefferson, went to the other extreme. One of Jefferson's biographers, John T. Morse, Jr., said that to the time when he was writing (1898) no President since Washington had ever been able to dictate to Congress as Jefferson could do, and upon sufficient occasion actually did. No President since Washington had ever led the people in such unquestioning obedience. "But these facts were not recognized at the time. Congress did not appreciate that it was receiving orders, the people had not the slightest notion that they were under control. For Jefferson never used the accent of command or assumed the bearing of a leader. His influence was singularly shadowy and mysterious. He simply communicated suggestions and opinions to this or that selected one among those who believed in him. The suggestions and opinions were followed not with any consciousness of discipline, but from a true feeling of admiration and confidence towards the

great and good statesman who seemed always to speak wisely and to think virtuously, who, at least, had many times proved to plan with unrivaled astuteness for the good of his party."

Morse points it out as a singular circumstance that the party which had chosen to declare itself the guardian of democratic principles has always from the outset been peculiarly prone to fall beneath the dictation of a single individual "No leader among the Federalists, the Whigs, or the Republicans (the present party of that name) has ever had a personal supremacy equal to that of Jefferson or that of Andrew Jackson. The Democrats have invariably been most powerful under the sway of a monocrat and have always taken kindly to that sway.<sup>1</sup>

Jefferson himself would probably have disclaimed his biographer's judgment. At any rate in December of 1803 he wrote to John Randolph. "I have been afraid to express opinions unasked, lest I should be suspected of wishing to direct the legislative action of members. They have avoided asking communications from me, probably, lest they should be suspected of wishing to fish out executive secrets."<sup>2</sup> He got along well enough, however, without public evidence of his control, if we may judge by the speech Randolph made in Congress when he broke with Jefferson and the administration, and began his long career of opposition. "You may go to war for this exercise of the carrying trade, and make peace at the expense of the Constitution," he said, "your Executive will lord it over you ... I have before protested, and I again protest, against secret, irresponsible, overruling influence. The first question I asked when I saw the gentleman's resolution was, 'Is this a measure of the Cabinet?' Not of an open, declared Cabinet, but of an invisible, inscrutable, unconstitutional Cabinet, without responsibility, unknown to the Constitution! I speak of back-stairs influence — of men who bring measures to this House, which, although they do not appear on its Journals, govern its decisions."<sup>3</sup>

It may be observed that "secret influence" was not unknown a century and more ago, either in essence or phrase.

Apparently John Adams did not appreciate how far Jefferson had carried his power. In view of their earlier animosities,

<sup>1</sup> John T. Morse, Jr., *Thomas Jefferson*, 235-37.

<sup>2</sup> *Writings of Jefferson*, P. L. Ford ed., VIII, 281.

<sup>3</sup> Quoted by Henry Adams, *John Randolph*, 175, 176.

it might be presumed that if the Massachusetts man had suspected usurpation of authority on the part of the Virginian, he would not in 1809 have dwelt upon the legislative as the menace "Corruption in almost all free governments," he wrote to the Boston Patriot, "has begun and been first introduced in the Legislature. When any portion of executive power has been lodged in popular or aristocratical assemblies, it has seldom, if ever, failed to introduce intrigue. The executive powers lodged in the Senate are the most dangerous to the Constitution, and to liberty, of all powers in it" <sup>1</sup> Perhaps this was fruit of his own experience, rather than of what at the moment he observed.

Neither Madison nor Monroe approached Jefferson in the exercise of power. Perhaps the temperament of the two men inclined them to keep their hands off legislative matters. It was a period when Congressmen asserted their independence. Nathaniel Macon of North Carolina, in 1810, called upon to give a vote in approbation of Madison's conduct in dismissing Jackson, the British minister, declared "I am opposed to addressing the President of the United States upon any subject whatever. We have nothing to do with him, in our legislative character, except the passing of laws, calling on him for information, or to impeach." Legislative encroachment was in the air. Said Daniel Webster to the Massachusetts Convention of 1820: "As if Montesquieu had never demonstrated the necessity of separating the departments of government, as if Mr. Adams had not done the same thing, with equal ability, and more clearness, in his defence of the American Constitution, as if the sentiments of Mr. Hamilton and Mr. Madison were already forgotten; we see, all around us, a tendency to extend the legislative power over the proper sphere of the other departments" <sup>2</sup> Yet John Quincy Adams, as Monroe's Secretary of State, mentions in his Diary (iv, 503) several instances where members of Congress came to him to submit drafts of bills that he might suggest modifications or obtain for them the opinion of the President. Adams himself as President deemed it his duty to advise and recommend to Congress such measures as he thought desirable in the public interest, and then to leave to Congress the responsibility if nothing was done.

Although evidence is scarce, it is probable that with Adams there disappeared, or at least waned to unimportance the practice

<sup>1</sup> *Works*, ix, 302

<sup>2</sup> *Journal of the Convention*, 306

that seems to have begun with Jefferson, of consultation with the President in the matter of appointing the committees of Congress, particularly in respect of the important chairmanships. The circumstances under which Adams became President aroused partisanship that led to committee selection favorable to his beaten rival Andrew Jackson.

It was with Jackson that the struggle between the two powers first took the dimensions of a great political issue. If you would know the distance to which he carried the presidential prerogative, take down your biography of Henry Clay by Carl Schurz, and read that Jackson treated the legislative power with a contempt almost revolutionary. "Not only did he, in the absence of Congress, set on foot measures, especially of financial policy, which Congress had already disapproved beforehand, and which he was sure would be rejected if submitted to Congress, but he lost no opportunity to denounce, in his public utterances, especially the Senate, but also his opponents in the House, as a set of conspirators against popular rights and the public welfare. Nothing, certainly, could have been farther from Jackson's mind than the desire to overthrow republican government, and to put a personal despotism in its place. But if a President of the United States ever should conceive such a scheme, he would probably resort to the same tactics which Jackson employed. He would assume the character of the sole representative of all the people, he would tell the people that their laws, their rights, their liberties, were endangered by the unscrupulous usurpations of the other constituted authorities; he would try to excite popular distrust and resentment, especially against the legislative bodies, he would exhibit himself as unjustly and cruelly persecuted by those bodies for having vigilantly and fearlessly watched over the rights and interests of the people, he would assure the people that he would protect them if they would stand by him in his struggle with the conspirators, and so forth. These are the true Napoleonic tactics, in part employed by the first, and followed to the letter by the second, usurper of that name."<sup>1</sup>

Jackson even went so far as to deny a right in the legislative to criticize the executive. In 1834 the Senate passed resolutions introduced by Henry Clay, one of which said that "the President, in the late executive proceedings in relation to the public

<sup>1</sup> Carl Schurz, *Henry Clay*, II, 108, 109

revenue, has assumed upon himself authority and power not conferred by the Constitution and the laws, but in derogation of both " This began the famous Censure episode

Jackson protested The resolution, he declared, wanting both the form and substance of a legislative measure, was not justified by any of the executive powers conferred on the Senate, nor did the proceeding belong in any way to the class of incidental resolutions "On the contrary, the whole phraseology and sense of the resolution seem to be judicial Its essence, true character, and only practical effect, are to be found in the conduct which it charges upon the President, and in the judgment which it pronounces upon that conduct That the Senate possesses a high judicial power, and that instances may occur in which the President of the United States will be amenable to it, is undeniable But under the provisions of the Constitution, it would seem to be equally plain that neither the President nor any other officer can be rightfully subjected to the operation of the judicial power of the Senate, except in the cases and under the forms prescribed by the Constitution The resolution charges in substance that in certain proceedings relating to the public revenue, the President has usurped authority and power not conferred upon him by the Constitution and laws, and that in so doing he violated both. Any such act constitutes a high crime — one of the highest, indeed, which any President can commit — a crime which justly exposes him to impeachment by the House of Representatives. The resolution, then, was in substance an impeachment of the President, and in its passage amounts to a declaration by a majority of the Senate, that he is guilty of an impeachable offence The safeguards and formalities which the Constitution has connected with the power of impeachment, were doubtless supposed by the framers of that instrument to be essential to the protection of the public servant, to the attainment of justice, and to the order, impartiality, and dignity of the procedure. These safeguards and formalities were not only practically disregarded in the commencement and conduct of these proceedings, but in their result, I find myself convicted by less than two thirds of the members present, of an impeachable offence "

Carl Schurz in his life of Clay (II, 40) took vigorous exception to this, and as an answer made long after the excitement of the moment had passed away, the criticism carries the weight of unprejudiced reflection. The pretension set up in Jackson's pro-



test, Schurz concluded, that the Senate, because it might have to sit as a judicial body in case of impeachment, had, as a legislative body, no constitutional right to express an unfavorable opinion about an act of the Executive — nay, that neither House of Congress had such a right except in case of impeachment, was altogether incompatible with fundamental principles of representative government. "The Constitution, indeed, authorizes the President to do certain things in his discretion; but this fact does certainly not take from the Legislature, or from either House, the right to inquire whether in a given case the President has acted within his constitutional discretion, or whether that discretion has been wisely exercised for the public good. The Senate is, indeed, a judicial body when it tries impeachments. But it is also a legislative body, and as such it can certainly not be stripped of the necessary privilege of discussing and criticising the conduct of public officers on the ground that such officers might possibly be impeached for the acts criticised."

Whether as a matter of abstract right, or of constitutional right, doubtless the view of Schurz is correct. He misses the real point of importance. A thing may be right and yet not be proper, not be expedient. Criticism of one branch of the government by another is not pertinent and may be impertinent. Where custom frowns upon it, or rules tend to prevent it, in the end better results prevail.

Poindexter of Mississippi moved that the "Protest" be not received. Clay held it a plain and palpable breach of the privileges of the Senate. Calhoun declared: "The principle on which the Senate acted is this: 'We have a right to express our opinion.' The gentleman (Benton) will be compelled to deny that; or, perhaps he may take refuge from such a predicament by qualifying his subversion of this first principle of legislative freedom. And how will he deny it, and yet apparently maintain it? He has only one resource left, and that is, to pretend that we have a right to express our opinions, but not of the President. Now, for the first time that such a doctrine has ever been heard on American soil, he is prepared to profess and publish, in the face of the American people, that old and worn-out dogma of old and worn-out nations, 'The King can do no wrong.'"

In reply Benton, Silas Wright, and others came to Jackson's defense. Had the President a right to send the protest to the

Senate? On this they held that any private citizen who feels aggrieved by the action of the Senate has a right to remonstrate in respectful language and appeal to the justice or the body inflicting the injury. Has the President lost this right because he holds public office? The Senate must receive the protest, for its duty as to this paper is the same as it is as to any other petition or remonstrance. But is it the duty of the Senate to enter the remonstrance on the Journal? That is a matter of justice, purely. We are told the President has no right to make such a demand. True; but he makes no such demand, he merely requests, respectfully requests, that we permit it to be entered that for all future time the Journal may exhibit the full case.<sup>1</sup>

Benton began a campaign for expunging the resolution of censure. It was carried into the State Legislatures, and at least ten of them instructed their Senators to vote for expunging. In 1836-37 Jackson's friends had a majority in the Senate and proceeded to expunge. When the Journal was mutilated, Daniel Webster said that if it were not for "the ruthless violation of a sacred instrument," the scene would be "little elevated above the character of a contemptible farce."

In August, 1842, President John Tyler sent to the House a message with his objections to a tariff bill. It was referred to a special committee, of which John Quincy Adams was Chairman, and this Committee made a report severely criticizing the message, whereupon the President sent a protest to the House, requesting its entry on the Journal. In reply the House passed resolutions copied from those of 1834, declaring the protest a breach of the privileges of the House, and declining to enter it on the Journal.

Certain newspaper publications of 1837 throw interesting light upon the drafting of bills in the times of Jackson and Van Buren. "The Atlas" and other Boston papers reported Richard Fletcher, a member of the House Committee on Ways and Means, as averring in a speech at Faneuil Hall in the course of the summer recess. "The Chairman of the committee steps up to the White House, and there receives from the President or the Secretary of the Treasury such bills as they wish to have passed by the House. The chairman puts the bills in his pocket, takes them to the committee without any examination, the majority of the committee approve them, the minority can do

<sup>1</sup> J. B. McMaster, *History of the People of the United States*, vi, 209

nothing, the bills are presented to the House, and received as the doings of the committee "

Upon the re-assembling of Congress, Chairman Churchill C. Cambrelong of the Committee on Ways and Means published in the "Washington Globe" a reply to this and other charges of the Boston speech "The usage from the commencement of the government," said he, "has been for the committee, through its chairman, to consult the head of the Department in regard to such measures as he may recommend for the consideration of Congress, for the Secretary to attend on, and confer with the committee, if invited, and to furnish drafts of bills embracing his own propositions, when requested to do so." He denied, however, the slavish acceptance of executive measures "word for word, letter for letter, comma for comma"; cited in proof the history of several bills, and presented in parallel columns the Secretary's draft of one of them, with its modified form as reported from the Committee on Ways and Means <sup>1</sup>

Further knowledge of the situation under Van Buren is to be gained from what Lieber wrote in 1838 "In Congress," he said, "members believed, and in fact known, to be personal friends of the Executive have declared that it was useless to debate on a certain subject, because the Executive would veto the bill if it should pass This is as much against parliamentary dignity and decorum as against true constitutional spirit. One of the great objects of the Constitutions is to secure independent action to various branches, and to produce by a union of all a well-poised result. These gentlemen could not have considered what frightful consequences might ensue from this incipient abuse If it were carried out with any degree of consistency, it would soon virtually deprive the legislature of its initiative power, and make it a body which has only to confirm or reject measures proposed by the administration, and in whatever degree it might be acknowledged, it would effectually forestall all necessary reforms, to which, for the time being, the majority as well as the executive were known to be opposed — all those 'annual motions' which have in most cases succeeded by dint of unconquerable perseverance" <sup>2</sup>

Harrison, elected in revolt against Jacksonian doctrines, took up the matter in his inaugural address, March 4, 1841. He con-

<sup>1</sup> L G McConachie, *Congressional Committees*, 222-24.

<sup>2</sup> *Manual of Political Ethics*, 2nd ed., II, 387.

tended that by no fair construction could anything be found to constitute the President a part of the legislative power. His duty to recommend legislation was simply a "privilege which he holds in common with every other citizen" He regarded it as "preposterous to suppose that a thought could for a moment have been entertained that the President, placed at the capital, in the center of the country, could better understand the wants and wishes of the people than their own immediate representatives", so, therefore, "to assist or control Congress in its ordinary legislation could not have been the motive for conferring the veto power on the President" In particular he held that the President "should never be looked to for schemes of finance"

Jackson had made the matter a party issue. Democrats looked with equanimity then, as they look to-day, on executive domination of the legislative Whigs viewed it with alarm Abraham Lincoln brought out distinctly this partisan difference in a speech in Congress in 1848. Said he "That the Constitution gives the President a negative on legislation, all know, but that this negative should be so combined with platforms and other appliances as to enable him, and in fact almost compel him, to take the whole of legislation into his own hands, is what we object to, is what General Taylor objects to, and is what constitutes the broad distinction between you and us To thus transfer legislation is clearly to take it from those who understand with minuteness the interests of the people, and give it to one who does not and cannot so well understand it."

Note what he had to say bearing on the contention now pressed that the popular will in matters legislative is or may be or ought to be expressed in the choice of the Executive: "My friend from Indiana has aptly asked, 'Are you willing to trust the people?' Some of you answered substantially, 'We are willing to trust the people; but the President is as much the representative of the people as Congress' In a certain sense, and to a certain extent, he is the representative of the people He is elected by them, as well as Congress is, but can he, in the nature of things, know the wants of the people as well as three hundred other men coming from all the various localities of the nation? If so, where is the propriety of having a Congress?"

Van Buren and Harrison had no occasion to resist Congress importantly, Taylor had much, Polk little, Taylor, Fillmore,

and Pierce none, Buchanan in only two serious instances. On the other hand, fear of the power of the President revived. Reverdy Johnson of Maryland was so disturbed that in the Senate in May of 1848 he declared "It may yet be that a diadem may sparkle on the brow of an American President" <sup>1</sup>

In the decade before the war, the Presidents exerted influence on Congress chiefly by the bestowal of appointments to office. The repeal of the Missouri Compromise and the passage of the Thirteenth Amendment were accomplished by the use of the executive patronage; and the Life of Hannibal Hamlin records that he spurned the offer of President Pierce to give him control of all the New England patronage in return for his vote for the Douglas Kansas-Nebraska Bill. When in 1858 the bill for the admission of Kansas under the Lecompton Constitution was before the House, a solution of the dilemma was found in the proposal offered by Representative English, of Indiana — in effect a bribe of public land to induce the people of Kansas to accept the Constitution. The administration was charged with being excessively active in winning support for this, the Secretary of the Treasury being conspicuous therein. Rhodes says (II, 300) the patronage of the government was used in an unblushing manner, large contracts for supplies for the military expedition to Utah were distributed to influence votes, and money was directly employed to aid the passage of the measure. A House investigating committee was appointed with Representative Covode at its head, to see if the President had, "by money patronage or improper means, sought to influence the action of Congress, or any committee thereof, for or against the passage of any law appertaining to the rights of any State or Territory."

Mason, in "The Veto Power" (p. 45), holds that this was "little more than a scheme to inculcate the administration and render it odious before the country," and he refers to Curtis' Life of Buchanan, where it would be naturally so viewed. The President protested that the House had no jurisdiction over him, and that in such proceedings all precedents demanded the presentation of particular charges, and an open and impartial investigation of those charges. So collateral issues were allowed to prevent throwing any light on the more important question

<sup>1</sup> Charles Warren, "Presidential Independence," *Boston University Law Review*, January, 1930

of the propriety of using the power of the executive to shape legislation.

After the war came the momentous conflict between Johnson and his Congress, almost resulting in Johnson's removal from office. Blaine said that perhaps a man of more desperate resolution than Mr. Johnson might have used his executive power more effectively against Congress, but he must have done so at the expense of his fidelity to sworn obligations. "The practical deduction as to the working of our governmental machinery, from the whole experience of that troublous era, is that two thirds of each House, united and stimulated to one end, can practically neutralize the executive power of the Government and lay down its policy in defiance of the efforts and the opposition of the President."<sup>1</sup>

Blaine's way of putting it shows the effort necessary for Congress to hold its own in the struggle. That it had not been successful, even in the fight with Johnson, would appear by what J. M. Ashley declared in the House of Representatives February 13, 1869, when Johnson's term was drawing to a close. "The experience of the past quarter of a century demonstrates the fact that the whole power of the national Government is gradually but surely passing under the complete control of our Presidents. The struggle of the great political parties for place and power strengthens his authority, and makes his will during his term of office the only law known to partisan Representatives in Congress."

#### SWING OF THE PENDULUM

The next quarter of a century hardly bore out Ashley's evident expectations. Indeed the pendulum swung the other way. On the whole it was a period of comparative independence. Senator George Frisbie Hoar, looking back from 1903, when he published his Autobiography, thought that when he came to the Senate, in 1877, it was "a more powerful body than ever before or since." Hoar went on to say (II, 45). "The most eminent Senators — Sumner, Conkling, Sherman, Edmunds, Carpenter, Frelinghuysen, Simon Cameron, Anthony, Logan — would have received as a personal affront a private message from the White House expressing a desire that they should adopt any course in the discharge of their legislative duties that they did not

<sup>1</sup> *Twenty Years of Congress*, II, 185.

approve. If they visited the White House, it was to give, not to receive advice."

In the clashes between the powers, sometimes the President, sometimes Congress, won. Grant vetoed a proposal to make the Clerk of the House of Representatives an officer to perform certain executive duties, as an encroachment on the right of the Executive to appoint officers. When an attempt was made to force Hayes to sign appropriation bills containing distasteful provisions, he vetoed bill after bill, threatened extra sessions until the government received the needed funds, and at last prevailed by the help of a public opinion that compelled Congress to yield. Cleveland wrestled with Congress less fortunately. His famous "perfidy" letter could not prevent the Senate from giving a protection flavor to the Wilson tariff bill, and he signed. George F. Parker, writing with intimate acquaintance, tells us the art of managing and directing legislative bodies lay beyond his purview. He did not know how to coax or wheedle. "If Mr. Cleveland resented the office-seeking propensity which has been developed in legislative bodies as being what he termed an encroachment upon the prerogatives of the Executive, he felt, in like manner, that for a President or Governor thus to purchase support was, in its turn, no less dangerous and reprehensible as an encroachment upon the rights and powers of the legislature. . . He was unalterably opposed to the use of the social influence of the Executive Mansion for controlling legislation. He did not invite men — and, what is far more potent, he did not have his wife invite women — to dinners, or luncheons, or receptions, for the purpose of commanding votes for or against some measure pending in Congress, however much he was interested in its success or defeat. He vetoed more bills than all his predecessors combined, but when these messages had been transmitted they must take their own course."<sup>1</sup>

Harrison was no more influential with Congress, and in the course of his term Professor John Ordronaux, of the Columbia Law School, writing of the division of powers, in his "Constitutional Legislation in the United States," could say (p. 349): "The pendulum of reform has swung so far in the direction of popular sovereignty, that it is from usurpations of legislative power, more than from any other source of public authority, that we now have cause for apprehension."

<sup>1</sup> *Recollections of Grover Cleveland*, 359-64.

Mark the revolutionary change in the generation since!

It is not generally realized that the swing toward present-day extremes began with McKinley. The glove of velvet so concealed the hand of steel, it was all done so graciously, so blandly, that the public hardly knew what was going on. Yet William H. Moody, who was close to him, tells us that to an extent unknown since the days of Jefferson he exercised an influence over the legislative action of both Houses of Congress.<sup>1</sup> Senator Hoar was of the same opinion. Said he in his Autobiography (II, 46). "President McKinley, with his great wisdom and tact and his delightful individual quality, succeeded in establishing an influence over the members of the Senate not, I think, equalled from the beginning of the Government, except possibly by Andrew Jackson." On the other hand, Henry Loomis Nelson, almost as well qualified to testify, thinks McKinley always insisted it was the duty of the President to refrain from interfering with the functions of the Legislature.<sup>2</sup> The explanation perhaps is that while recognizing and observing the constitutional proprieties, he saw nothing improper in avoiding conflict and at the same time getting his way by the arts of friendship that he had found so efficacious while he was a Congressman himself. He persuaded rather than drove.

No question arises over his successor. Roosevelt frankly disclosed his belief that it was right for him to coerce if he could not convince. He himself has described how he did it. "There were," he says, "many points on which I agreed with Mr. Cannon and Mr. Aldrich, and some points on which I agreed with Mr. Hale. I made a resolute effort to get on with all three and with their followers, and I have no question that they made an equally resolute effort to get on with me. We succeeded in working together, although with increasing friction, for some years, I pushing forward and they holding back. Gradually, however, I was forced to abandon the effort to persuade them to come my way, and then I achieved results only by appealing over the heads of the Senate and House leaders to the people, who were the masters of both of us. I continued in this way to get results until almost the close of my term, and the Republican party became once more the progressive and indeed the fairly radical progressive party of the Nation. When my successor was

<sup>1</sup> "Constitutional Power of the Senate," *North American Review*, March, 1902.

<sup>2</sup> "The Hampered Executive," *Century Mag.*, May, 1903.



chosen, however, the leaders of the House and Senate, or most of them, felt that it was safe to come to a break with me, and the last or short session of Congress, held between the election of my successor and his inauguration four months later, saw a series of contests between the majorities in the two houses of Congress and the President — myself — quite as bitter as if they and I had belonged to opposite political parties. However, I held my own. I was not able to push through the legislation I desired during these four months, but I was able to prevent them doing anything I did not desire, or undoing anything that I had already succeeded in getting done.”<sup>1</sup>

It will be observed that he tells first of working with leading Senators and the Speaker of the House — personal relationships of a sort not avowed during the first century of the Republic, if indeed they often existed. Next he tells of calling in the force of public opinion. This was no novelty, for many of his predecessors had resorted to it, though not so frankly. Much more unusual was his use of the veto power as a club, though we have seen that Hayes did the same thing. It was probably the difference between the personalities of the men that brought a greater storm of protest when Roosevelt publicly warned Congress he would not sign certain measures. The averment was that he ought not to veto a bill until it was laid before him.

Senator Hoar took umbrage over Roosevelt's methods of management. Answering criticism by “*The Outlook*,” Mr. Hoar wrote “A Senator stated on the floor that a bill which he desired to have taken up and passed was approved by the President and one of the heads of the Departments, and that the President, although he had shortly before vetoed a similar bill, was not satisfied that the bill ought to pass. Of that statement I complained, calling attention to the fact that such statements as to the opinion of the Crown are always held a breach of privilege in the British Parliament, and I urged that nobody had the right to try to influence legislation by statements of the opinion of the President, to which I added that ‘the time for the President to make up his mind about legislation is after we have passed it and not before, unless he avail himself of his constitutional right to make recommendations in his messages, which is the proper way.’”<sup>2</sup>

<sup>1</sup> *The Outlook*, November 2, 1913.

<sup>2</sup> *The Outlook*, March 28, 1903.

Mr. Hoar might have added that the point had been ruled upon in the Senate itself, for when (May 15, 1874) Senator Chandler even went no farther than to say that a policy announced in a veto message would show that "it is extremely doubtful whether the President will sanction any inflation of an irredeemable currency," the presiding officer declared it out of order. Five years later (April 4, 1879), in the House, James A. Garfield, denying that he had threatened bills of the majority with a veto from the Executive, declared: "It would be indecent on my part, it would be indecent for any of us even to speak of what the Executive intends to do; for none of us have the right to know."

To Senator Hoar "The Outlook," always a champion of Mr. Roosevelt, retorted (March 28, 1903): "In our judgment, the President occupies a position more nearly akin to that of a Prime Minister than to that of a King of England. The King has no politics and belongs to no party. The President, like the Prime Minister, is the official leader of the party which has elected him to office. There is very good reason, therefore, why he should inform Congress of the views which he entertains as the leader of his party, and this has often been done by Presidents in other ways than through formal messages."

Four years later the same periodical again came to the President's defense, elaborating its theory of the executive function: "No doubt Mr. Roosevelt has exercised a greater influence over legislation than any other President in the last half-century. But how? By a display of military power? Has there been in sight any possibility of an American Cromwell dispersing a recalcitrant House of Representatives? No one imagines that. Has he then dragooned or bribed the House by his use of patronage? No man since Jackson's time, not even Grover Cleveland, has used patronage so little for political ends. The same critics who condemn him for the use of autocratic power condemn him for relegating appointments to the Congressmen. He has seen a public injustice, he has felt the rising but unexpressed public indignation, he has given voice to that indignation and that will. And Congress has passed the Railway Rate Regulation Bill, not in response to the demand of the President, but in response to the demand of the people interpreted by a President who understood them and spoke for them. This is not autocracy, it is Centralized Democracy, and in this Central-

ized Democracy is the hope, not the peril, of America. Money kings it is very difficult to dethrone, but the President and his Cabinet can be relegated to private life at the next election if they do not rightly interpret and justly and efficiently carry out the public will " <sup>1</sup>

About the same time Congressman McCall described the situation from the opposite point of view "The influence of the Executive upon legislation," he wrote, "is to-day by no means confined to those common constitutional methods of expression, the veto and the message recommending legislation, but it is chiefly shown by an influence exerted upon the individual members, upon the legislative machinery of the two Houses, and even by special messages upon amendments proposed to particular bills, which in effect amount to written speeches upon the mere details and phraseology of measures, and are read in that House in which the debate is proceeding. There are concentrated in the person of the President the great authority of the party leadership and the far greater practical authority which results from the vast powers of his office, of which by no means the least important, and certainly the most corrupting, is the control of the patronage. Unless there is a scrupulous and restrained exercise of these enormous powers, the presidential office becomes a formidable engine for throwing the whole mechanism of the Constitution out of gear. The practical absorption of the great prerogatives of Congress has gone as far as it can be permitted to go with safety to our system of government " <sup>2</sup>

Roosevelt was the first to speak publicly of "my policies." He it was who accustomed the public to think that the President should have "policies" of his own. His successor, Taft, also had "policies." Before Taft went into office he issued a formal statement of them, enumerating various specific heads of legislation he sought. His attitude toward them, however, was somewhat different from that of Roosevelt. He described his view of the duty of a Chief Executive in "Four Aspects of Civic Duty" (p. 100). "Under our system of politics the President is the head of the party which elected him, and cannot escape responsibility either for his own executive work or for the legislative policy of his party in both Houses. He is, under the

<sup>1</sup> *The Outlook*, January 26, 1907, p. 161

<sup>2</sup> "The Fifty-Ninth Congress," *Atlantic Monthly*, October, 1906.

Constitution, himself a part of the Legislature, in so far as he is called upon to approve or disapprove acts of Congress. A President who took no interest in legislation, who sought to exercise no influence to formulate measures, who altogether ignored his responsibility as the head of the party for carrying out ante-election promises in the matter of new laws, would not be doing what is expected of him by the people. In the discharge of all his duties, executive or otherwise, he is bound to a certain extent to consult the wishes and even the prejudices of the members of his party in both Houses, in order that there shall be secured a unity of action by which necessary progress may be made and needed measures adopted."

The complaint made of Mr. Taft was that he did not put this view into effect with the results the public wanted. A typical verdict was that of an editorial in "World's Work" for November, 1913: "The public expects the President to manage Congress. If he does not do this, he is not considered a successful President. A failure to dominate Congress was Mr. Taft's chief shortcoming in the public mind. He was elected to get laws of a certain character passed and they were not passed." Samuel J. Kornhäuser three years before had said much the same thing of the public expectation: "A President to-day is judged, not according to the success he achieves in enforcing laws, in managing the gigantic business of the nation that has been expressly committed to his care, but by how well he succeeds in securing legislation." <sup>1</sup>

The view Mr. Taft himself expressed is not inconsistent with this. Then why did he not meet the public expectation? Mr. Kornhäuser has explained. "It was a shock to the public that a President, after merely submitting in calm and dispassionate tones his recommendations to Congress, should leave that body free to deliberate and frame a bill according to its best judgment. That he forbore to importune Congress, to threaten it, to insist dramatically that it revise schedules according to his ideas and the popular demands, that he did not bear down upon that body with all the force and power of his high office, appeared as an unpardonable failure to perform his plain duties. To assume that Congressmen could be actuated by a patriotic desire to serve the people honestly, was regarded as heresy. And such

<sup>1</sup> "President Taft and the Extra-Constitutional Function of the Presidency," *North American Review*, November, 1910.

has come to be the normal feeling. A growing suspicion has ripened into a firm conviction that members of Congress do not represent public interests, but instead the interests of special groups seeking privileges. And as a corollary there has arisen the assumption that the President is not merely the administrative head of the nation, but also, and pre-eminently, the extraordinary representative of the people at large, to stand as the champion of their rights, and to compel their unfaithful direct representatives to do their bidding. He is the chief, the overshadowing figure in the Government. He must at all hazards secure demanded legislation. If the lawmaking body is unwilling, if it hesitates, if it disagrees as to the expediency of proposed laws, if it resists, it must be beaten into submission."

Toward the end of Mr. Taft's term, the Senate passed this resolution, all the Democrats voting for it, and twenty-three Republican Senators voting against it. "*Resolved*, That any attempt on the part of a President of the United States to exercise the powers and influence of his great office for the purpose of controlling the vote of any Senator on a question involving a right to a seat in the Senate or any other matter within the exclusive jurisdiction of the Senate would violate the spirit if not the letter of the Constitution and invade the rights of the Senate." The object was evident. It was to rebuke directly Mr. Taft, and indirectly Mr. Roosevelt, for their condemnation of Senator Lorimer. Mr. Roosevelt was at the time a Contributing Editor of the *Outlook*, and it may be surmised he was not out of sympathy with what that periodical had to say on the subject in its issue of August 3, 1912. "The *Outlook* absolutely and totally dissents from this resolution. We agree with what Dr. Woodrow Wilson has said in his volume on 'Constitutional Government in the United States': 'The personal force of the President is perfectly constitutional to any extent to which he chooses to exercise it, and it is by the clear logic of our Constitution that he has become alike the leader of his party and the leader of a Nation.' The President has no right to attempt to control the vote of any Senator on any subject by the giving or withholding of patronage. He has not only a right, but a duty, to exercise upon the Senate all the moral influence which he can by argument and persuasion on any subject which is before them and which he deems of sufficient importance to justify his action."

Mr. Wilson as President was to bring into prominence the doctrine of executive leadership in legislative affairs more than any of his predecessors. He may or may not have dominated Congress more effectively than Jefferson or Jackson, but he at any rate did it more openly and frankly. This was to have been expected. From the day when as a college student he wrote a magazine article on "Cabinet Government in the United States," he had continually preached executive responsibility. In later essays, in books, in discussions, he had urged the English theory. When he became Governor of New Jersey, he put it in practice just as far as constitutional limitations would permit. Soon after his election as President he wrote "He [the President] is expected by the nation to be the leader of his party as well as the chief executive officer of the Government and the country will take no excuses from him. He must play the part and play it successfully or lose the country's confidence. He must be prime minister, as much concerned with the guidance of legislation as with the just and orderly execution of law, and he is the spokesman of the nation in everything, even the most momentous and most delicate dealings of the Government with foreign nations" <sup>1</sup>

No sooner had he entered the White House than he began acting upon his belief. He found a willing Congress. At its conclusion the *Outlook* said with accuracy (and with approbation): "In the record of the Congress whose work just ended is reviewed elsewhere in this issue, one fact stands out above all others: from first to last this National Legislature has been led — one might almost say commanded — by the President ... What Congress has done or failed to do, it would not be unjust to say that President Wilson has done or failed to do." <sup>2</sup>

Professor Ford, writing a year later, thought that while President Wilson made an energetic use of the influence of his office to promote action, it was always with respect to measures to which his party was committed and in the exercise of his recognized function as the party leader <sup>3</sup>. That may have been the President's intention, but it is to be doubted whether he in fact confined himself to party utterances any more closely than Mr

<sup>1</sup> Woodrow Wilson to A. M. Palmer, February 5, 1913, printed in *Boston Transcript and New York Sun*, January 11, 1916

<sup>2</sup> *The Outlook*, March 17, 1915

<sup>3</sup> "The Record of the Administration," *Atlantic Monthly*, May, 1916

Roosevelt. Nature made each too virile and self-reliant for such limitations. Doubtless each could have found something in party literature to justify him, just as any sectarian can find support for his views in the Bible. The fact is that each came to the White House accustomed to think and act by himself.

In the same article Professor Ford said: "It will be practically impossible hereafter for anyone who takes office as President of the United States to pretend that he can acquit himself of his legislative obligations merely by requesting Congress to take matters into consideration." As the same thing could have been said with equal warrant when Andrew Jackson was President, I am not convinced that Professor Ford would be able to justify his prophetic assurance by reference to history. More than that, if he agreed with many observers in drawing a moral from the election of 1920, he might not thereupon have cared to prophesy at all, for it is the common belief that what in the campaign was commonly referred to as Mr. Wilson's autocracy, was in no small measure responsible for the overwhelming defeat of his party. So many factors contributed to this defeat, that it is not safe to attempt appraisal of their relative share, but at least it can be said that the attack upon the President's domination of Congress was widespread, and that on this score hardly a word was raised in defense. The strong men of his own party who through his first term and indeed until the end of the War had endured and in public had even extolled his leadership, refused to ask from the electorate approval of a system under which they had chafed and which toward the last they in private frankly resented. The mass of the people seemed to feel that they wanted their Congress to function again as an independent branch of the government.

The people approved the revolt of the Senate against the attempt of the President to secure ratification of the Treaty of Versailles without substantial change. It is not safe to affirm that they approved the revolt because it was a revolt, but clearly they did not punish the Senate because it revolted. Very likely objection to the treaty itself was the controlling motive in most minds, but there is ground for thinking that if the President had not tried to coerce the Senate, if he had treated that body as an equal and not as a subordinate, he might have seen us enter the League of Nations. It was his own application of his own theory

of government that turned the tide against him at a critical juncture.

Then a period of reaction lasted through a dozen years. Yet the only real difference was that Presidents Harding, Coolidge, and Hoover worked less in the open. Each of them relied mainly on quiet interviews with Senators and Representatives, called to the White House singly or in groups. Mr. Harding, fresh from the Senate, where his genial qualities had made for him warm friends, could work effectively through them. Mr. Coolidge, gifted with political skill, knew how to bring outside influence to bear when necessary. In a magazine article written after his retirement, he said:<sup>1</sup> "I never felt it was my duty to attempt to coerce Senators or Representatives, or to take reprisals." He testified that he always found the members of both parties willing to confer with him and disposed to treat his recommendations fairly. He believed it to be the business of the President as party leader to do the best he could to see that the declared party platform purposes were translated into legislative and administrative action.

Mr. Hoover appeared at the moment to be less successful, but when time gives the right perspective, historians may say that taking into account the conditions, his leadership was of the soundest and strongest. He had been in office barely half a year when the stock market crashed and we entered on a business depression that was to be as calamitous as any the world has ever seen. Hampered by a Congress where his party did not have full control and then by another distinctly hostile politically, with few of the members in either of them fully realizing the gravity of the crisis and the necessity of quick, united action, yet he met two dire emergencies successfully by calling into group conference the leading members of the two parties in each House and convincing them of the need to push through at once the measures he proposed. Perhaps a third emergency of equal magnitude would have been met in the same way had it not come just as his term was ending. In some other matters, such for instance as the reorganization of the whole administrative establishment, he was no more successful than his predecessors, but that was because of Congressional opposition no President could overcome.

Success in control was the good fortune of the incoming

<sup>1</sup> *American Magazine*, August, 1929.



President With a Congress predominantly of his own political faith, with universal distress compelling public interest to be uppermost in mind, with the spoils of office not yet distributed, Mr. Roosevelt was able in a few months to accomplish more in the way of radical reform and revolutionary enactment than any dozen Presidents had ever brought about Senators and Representatives vied in doing his bidding Theirs not to question why. Executive dominance was supreme

As time passed, with no enduring revival of trade, with industry continuing stagnant, with ten million wage-earners, more or less, still out of employment despite unprecedented attempt at control and reform, with the price of farm supplies rising faster than income, with the cost of living for everybody increased, a terrified Congress continued renouncing its responsibilities, forsaking its duties and its rights Committees submitted even the details of bills to the President before daring to make report, and his judgment thereon was seldom questioned. Individual votes were changed by intimations of loss of patronage Threats of vetoes were made more freely on floor of House or Senate than ever before In the middle of debates leaders sometimes hurried to the telephone booths, found out what the President wished, and reported it to bring into line members inclined to balk

The President himself, in a declaration that has been too little pondered by our people, approved a change that if permanent will be revolutionary. In concluding his message of January 3, 1934, he said: "A final personal word. I know that each of you will appreciate that I am speaking no mere politeness when I assure you how much I value the fine relationship that we have shared during these months of hard and incessant work Out of these friendly contacts we are, fortunately, building a strong and permanent tie between the legislative and executive branches of the government The letter of the Constitution wisely declared a separation, but the impulse of common purpose declares a union In this spirit we join once more in serving the American people "

If in carrying out what was unquestionably their intent, the framers of the Constitution were wise in their declaration, its subversion is hardly to be justified by an impulse. However, the people seem to have approved, at least temporarily, for "Stand by the President!" was the effective slogan in the campaign of

1934 and the already overwhelming majority of his partisans in the House was increased with men who had mostly agreed not to think for themselves.

The older members, however, were getting restless, were threatening to become insubordinate. Furthermore, big majorities tend to disintegrate. They breed factions. Evidently recognizing this, Mr. Roosevelt shrewdly and properly changed his tactics. In his first Congress his important measures had come to Congress with what in effect were virtually orders to sign on the dotted line, and serious changes without Administration approval were next to impossible. With his second Congress Mr. Roosevelt turned from orders to suggestions, giving House and Senate to understand they were at liberty to whip the proposals into shape. Yet Administration influence remained strong.

Prophecy is not the province of such a book as this, but it surely is permissible to disclose trends, so that those who would know the future from the past may have basis for prediction if they wish. Were the fluctuations of executive power in the little less than a century and a half of our experience with Presidents charted after the fashion of the statisticians, the jagged line would show the higher peaks each somewhat above its predecessor. The mean rises. We do not yet approach dictatorship, but we move in that direction. This has been the history of democracies. Sooner or later they become autocracies. If at the end of another century and a half some antiquarian chances to read these pages, he may find that history again repeated itself.

As for the immediate future, note two facts emphasized by Norman J. Small in his judicious and informative book on "Presidential Interpretations of the Presidency" (1932, p. 194): first, that the emergence of presidential leaders has been sporadic, reasonably long periods having separated their terms in office; and secondly, that of the Executives he had discussed, not one had successfully sustained his leadership for an interval longer than six years. It may be pointed out, furthermore, that intervals between aggressive leaderships are in part due to differences in the temperament of Presidents and also in part due to mass reactions of the people themselves, both of which phenomena are likely to be repeated. They make small the likelihood of any early conclusion of our experience as a republic.

After all, leadership by the President is a matter of degree, and

the length of the arc through which the pendulum swings is not so great as the theorists would have us think. The complaint was that Mr. Wilson did not co-operate with his Senate. That was the complaint against Grover Cleveland and Andrew Johnson and John Tyler. The people want their Executives to work with their legislators. Thus their Constitutions contemplate. That of the nation says the President is to recommend to the consideration of the Congress such measures as he shall judge necessary and expedient, gives him the right to veto; and directs that he shall exercise the most important of lawmaking powers, that of treaty making, with the advice and consent of the Senate. Why then should it be declared with flavor of censure that the President has made himself a third branch of the Legislature? Edward Stanwood took this ground at the October meeting of the Massachusetts Historical Society in 1912. There are three steps in the enactment of a law, he said: the initiative, the introduction of a measure; the consideration of amendments; and the final passage. "The modern President performs all three of these functions. He proposes measures, he indicates the form they shall take; and if his views are met he signs them — that is, he passes them."<sup>1</sup>

True enough, but why not, so long as the President bears himself as a co-ordinate and not as a superior?

All such interpretations of development as that of Mr. Stanwood should be modified by calling attention to the comparatively small part in the total of legislation played by the Executive. The measures he helps to shape are really few compared to the whole, but they are the more spectacular and get the most of public attention. Our Presidents still mainly acquiesce.

#### GOVERNOR AND LEGISLATURE

Turn now to the relations between Governors and State Legislatures. The lamentable lack of material for the study of early State history makes it impossible to trace what has happened, with anything like the thoroughness that is easy in the matter of national affairs, but here and there we can get some light. We know beyond question that it was the intention of the framers of the original Constitutions to shackle the Executive. When William Hooper came home from the North Carolina Convention and his constituents asked him what power they

<sup>1</sup> Mass Hist. Soc. Proceedings, XLVI, 91.

had given the Governor, he replied. "Only power enough to sign a receipt for his salary" Madison in 1787 declared that the Executives of the States were little more than ciphers; the Legislatures were omnipotent. As a rule all important civil and military officers were elected by the Legislature, and it exercised many executive and administrative functions.

We are in the dark as to how early it was that Governors began to assert themselves, but something on this is to be gathered from a delightful story told by a biographer of Samuel Adams.<sup>1</sup> He says that a conflict which seems to have aroused the old energy of Adams more than any other in the course of his declining years was that as to whether theatrical representations should be allowed in Boston. In 1790 the Legislature was petitioned for authority to open a theater, which was promptly refused. In the following year a town-meeting instructed the Representatives to obtain, if possible, a repeal of the prohibiting act. It was carried, over the protest of Samuel Adams and the old-fashioned citizens. When Harrison Gray Otis made a vigorous demonstration on the same side, Samuel Adams "thanked God that there was one young man willing to step forth in the good old cause of morality and religion." He himself fought the Philistines on the floor of Faneuil Hall until his weak voice was drowned in roars of disapproval. The prohibiting act was not repealed, but a theater was opened in spite of it, whereupon Hancock vindicated the law by causing the whole company to be arrested on the stage. A new application from the town for a repeal of the act brought the Legislature to compliance.

Samuel Adams had now become Governor. His theory was that the Governor was simply an executive officer, whose only proper function was to carry out the popular will as expressed in the legislative enactments. He said in one of his inaugurals: "It is yours, fellow-citizens, to legislate, and mine only to revise your bills under limited and qualified powers; and I rejoice that they are thus limited. These are features which belong to a free government alone." But desperate circumstances demanded desperate expedients. His dear Boston, instead of becoming the "Christian Sparta" of his dreams, was fast going to the dogs of depravity. Under the circumstances consistency was a jewel not at all too precious to be sacrificed. He set himself stubbornly against the popular will and vetoed the repeal. So long as he sat

<sup>1</sup> J. K. Hosmer, *Samuel Adams*, 404

in the chair of the chief magistrate the prohibitory law remained on the statute books, though the scandalous play actors dodged through their performances after a fashion in spite of the constables, to the delight of the graceless generation which had come into the places of the fathers

I find another illuminating story in Governor Thomas Ford's "History of Illinois" (pp. 26, 27), suggesting how it was that the States came to take away from their Legislatures the power of appointment. When the first Constitution of Illinois was framed, in 1818, Ford tells us, it was expected that Shadrach Bond would be the first Governor. The Convention wished to have Ehjah C. Berry for the first Auditor of Public Accounts, but it was believed that Governor Bond would not appoint Berry to the office, and so the Convention declared in the schedule that "an Auditor of Public Accounts, an Attorney General, and such other officers of the State as may be necessary, may be appointed by the General Assembly." The Constitution, as it stood, vested a very large appointing power in the Governor, but for the purpose of getting one man into office, a total change was made, and the power was vested in the Legislature.

It was for many years a question, what was an "officer of the State"? Were States' attorneys of the circuit such officers? Were the canal commissioners such officers? The Legislature afterward decided that all these were State officers, and passed laws from time to time, vesting in their own body all the appointing powers on which they could lay their hands. In this mode they appointed canal commissioners, fund commissioners, commissioners of the board of public works, bank directors for the principal banks and branches, canal agents, States' attorneys, and all sorts of agencies that seemed to be necessary. Sometimes such agents were appointed by election, then again the Legislature would pass a law enacting them into office by name and surname. It contrived to strip the Governor of all patronage not positively secured to him by the Constitution, such as the appointment of a Secretary of State, and the filling of vacancies occurring in the recess between sessions.

At first the Legislature contented itself with the power to elect an Auditor and Attorney General. The Governor appointed all the States' attorneys, the recorders of counties, all State officers and agents occasionally needed, and many minor county officers. But in the administration of Governor Duncan

he was finally stripped of all patronage, except the appointment of notaries public and public administrators. Sometimes one Legislature, feeling pleased with the Governor, would give him some appointing power, which their successors would take away, if they happened to quarrel with him. "This constant changing and shifting of powers, from one co-ordinate branch of the government to another, which rendered it impossible for the people to foresee exactly for what purpose either the government or Legislature were elected, was one of the worst features of the government. It led to innumerable intrigues and corruptions, and for a long time destroyed the harmony between the executive and legislative departments. And all this was caused by the Convention of 1818, in the attempt to get one man into an office of no very considerable importance "

In Massachusetts the respective rights of Executive and Legislative came squarely in issue when the Know-Nothing movement had put Governor Gardner in office. In March of 1857 he saw fit to veto a resolve directing the Secretary and other State officers "to furnish, at the same time, to all daily papers published in the city of Boston, all announcements of appointments, returns of votes, and public notices." One may surmise that some newspaper thought it had been slighted or that there had been other favoritism. Whatever may have been behind the resolve, the Governor gave what now seem good reasons for a veto. But he added others not so good in the eyes of the Legislature, and although they sustained the veto, they resented its terms. The Governor said of the resolve: "It certainly must be deemed a novel, as well as indefensible encroachment on the province of the executive, to attempt to dictate in what manner purely executive acts shall be promulgated ... It is an arbitrary, unjust, and unconstitutional encroachment upon the freedom and privileges of the executive department, and an unauthorized attempt at dictation as to the manner in which its peculiar duties shall be done "

The offended Legislature met this with the appointment of a joint special committee, headed by George Frisbie Hoar, later distinguished Senator from Massachusetts, and it may be presumed that Mr. Hoar wrote the report. "His Excellency," it said, "finds authority for his proposition in that section of the Constitution which provides that 'the legislative department shall never exercise the executive and judicial powers, or either

of them.' It is obvious that the prohibition contained in this clause extends to all executive and judicial powers, and if his interpretation of its meaning is correct, all executive and judicial officers of whatever grade, are entitled to the same freedom from legislative authority which he claims for himself. If the Legislature cannot direct his Excellency to issue a proclamation, or enact in what mode or through what channels the same shall be made public, they cannot, by the same reasoning, give such directions to a deputy sheriff or constable, or to a judge or clerk of a court. We cannot concur in this view of the meaning of the Constitution, which, it seems to us, if carried to its logical results, would deny substantially the power of making laws altogether. Every law, except so far as it is voluntarily acquiesced in by the people, must depend on the judicial department for its interpretation, and on the executive department for its enforcement, and must, therefore, of necessity impose new duties and obligations on those departments. It is essential to the proper enforcement of laws, and to making them harmonious and convenient in their operation, that the same power which enacts them shall have authority to prescribe the time and manner in which they shall be enforced."

The committee reported an order, of which the vital part for us is a declaration that the constitutional provision in question "was designed solely to prohibit the *exercise* by the Legislature of executive and judicial functions, and not to prevent the Legislature from directing the performance by either of these departments of such executive and judicial duties as it shall see fit to prescribe", and "that it is competent for the Legislature to regulate by law all the duties of the several officers of the Commonwealth."

The order was passed by both Senate and House.

A few years later another Massachusetts Governor, John A. Andrew, had a good deal of trouble with his Legislatures. A biographer tells us he was the last man in the world to pull wires, to whisper a word in the ear of a recalcitrant Senator or Representative. Then, too, he was all for speed and efficiency; he could not wait for the slow performance of a legislative body. The result was friction to such extent that in the course of the session of 1862 a leading member of the House said Andrew ought never again to be a candidate for Governor, and his reelection was impossible. But the less a Legislature likes a Gov-

ernor, the more the people love him, and Andrew was re-elected.

Toward the close of the session of 1864, when a loan bill appropriating ten million dollars as a bounty fund was to be framed, a clause was inserted providing that the Finance Committee of each branch of the General Court "by concurrent action" with the Governor and Council should have a voice in deciding how the scrip should be disposed. "To say nothing of the personal insult to Andrew, such an excursion of the Legislature into the executive field was of doubtful constitutionality. Although the Legislature had thought to have things all its own way by not sending the bill to the Executive Chamber before the last day of the session, he was not thus to be imposed upon; he wrote a veto message which, though brief, pointed out to the Legislature the egregious mixture of governmental functions which it wished to make." Both branches passed the bill over the veto, and then sent to the Governor the usual committee announcing that the General Court had finished its business and requesting that he prorogue the session.

They forgot that the general appropriation bill was still unsigned. Impatient to leave for home, members from a distance had begun drawing their pay from the Treasury. The Governor promptly notified the Treasurer that as the general appropriation bill had not been signed, the Treasurer had no legal right to pay a dollar to any member, and if he did it, the Governor would hold him personally responsible. This brought matters to a deadlock. "What are you going to do?" asked Councillor F. W. Bird of the Governor. "Do? I am going to let those fellows know that *we* run this machine! They have had their way all winter abusing us, and now I am going to have mine! We have got to carry on this government, and they must pass a loan-bill that will enable us to do it. Not a man of them shall get his pay, nor will I prorogue them, until they have passed a loan-bill such as we have agreed is necessary." And they did.

Whether or not the sec-saw of the Executive and Legislative in Washington during the first century or so of the Republic was imitated in the States, it is certain that coincident with the recent rise of the national Executive has been a rise in the power of all the State Executives. One-man power is the order of the day. It has not been altogether the achievement of those we ordinarily think of as reformers. When Governor Odell was in the executive chair of New York, "The Nation" of April 21,



1904, said: "No man need deceive himself about the legislative situation at Albany. It is what the Governor makes it. All important legislation is shaped by him. His orders issue, and his puppets in either House execute them. No bill of any consequence is passed, none is killed, none is held in suspended animation, except at the Governor's nod ... Never has it been so true as this year of legislation at Albany that a breath creates it and a breath destroys — and the breath comes from the Executive Chamber."

One may be permitted to smile on contrasting this with what was said of a later Governor of New York, Charles E. Hughes, by a high priest of autocracy in politics, Thomas C. Platt. "As for Hughes," he declared, "he is too much of an idealist to suit me. I never have had any use for a man who, after accepting honors from his party, assumes to be bigger and better than the party, and strives to wreck it. I never saw so much tyranny and intolerance exhibited in public office as I have witnessed in Hughes. While pretending to fight bossism, he developed during his first term as the greatest boss that ever sat in the Executive Chamber. Unlike any of his predecessors, he spurned suggestions that he ought to consult with legislative leaders about proposed laws. For two years he arrogated to himself both Legislative and Executive powers. He sought to make two hundred men, elected to represent respective constituencies all over the State, mere 'rubber stamps.' From January 1, 1907, to January 1, 1909, there was no Legislature at Albany."<sup>1</sup>

Mr. Hughes himself, while Governor of New York, set forth his conception of his relation to the Legislature thus: "I have no desire to usurp the function of the Legislature in any degree. It is my privilege and duty to recommend to the Legislature such matters as I deem expedient. And when a matter is deemed to be expedient, it is my duty to urge it as vigorously as I may. It is also my duty to pass upon the bills that come before me, and, when I believe that a measure is contrary to the interests of the State, to express my disapproval in the constitutional manner. But it is not my province to attempt to curtail the privileges of the Legislature or to seek to control its action, except as it may be influenced by the expression of sound opinion and by recommendations supported by the people of the State."<sup>2</sup>

<sup>1</sup> *Autobiography of Thomas C. Platt*, 464

<sup>2</sup> To the Republican Club of the City of New York, October 18, 1907.

We need not here try to decide between Mr. Platt and Mr. Hughes as to what actually took place. It is enough to set down that the general belief throughout the country was to the effect that Mr. Hughes was a masterful man, and this belief unquestionably shared in bringing to him the nomination for the Presidency. It is also certain that domination of the Legislature became a popular thing in various States in the course of the first decade of the century. La Follette in Wisconsin, Johnson in Minnesota, Hoch in Kansas, Woodruff in Connecticut, Fort in New Jersey — these and others pressed their views on their Legislatures and worked to get them carried out, and the people applauded.

Then came Woodrow Wilson in New Jersey with so vigorous an application of the theory that it made him President. His friend Professor Ford tells of it: "He took an active part in shaping measures and in conducting legislation, he attended party caucuses, and on one occasion at least he served as a member of a committee appointed by the caucus to prepare a bill. These activities were carried on under steady fire from a faction of his party that not only opposed his views, but questioned the propriety of his behavior. He defended his conduct with unruffled temper, dauntless courage, and unfailing resources, and he needed them all, for, although his behavior was thoroughly constitutional in every sound and proper sense, he was disregarding old traditions. The complaint was frequently lodged against him that he was unwilling to allow the Legislature to take the responsibility. This had reference to his practice of going on the stump and appealing to the people when measures that he was championing stuck on the legislative ways. It will appear from this that he takes the view that the duty of recommendation involves the full exercise of the authority and influence of the executive office."<sup>1</sup>

Even in Massachusetts, a State venerating tradition and scrupulous in its observance of constitutional provisions, the barrier between Executive and Legislative has been breaking down. It became known that Governors who sent their influence into the chambers of the General Court, won popular approval, while those who kept their hands off, gained no prestige by remembering the Constitution, but were likely to suffer therefor. The "policies" of the Governor are now disclosed without hesi-

<sup>1</sup> "The Record of the Administration," *Atlantic Monthly*, May, 1916

tation. Governor Eugene N Foss in 1911 went so far as to furnish one of the rare instances where a State executive has openly sought the amendment of a measure before it reached him. He sent in a message beginning — "I note that the popular branch of the Legislature has advanced by a large majority, a bill to establish biennial elections in this State" He went on to say he believed the bill could not satisfy the requirements of the people because it did not provide for the recall. The Governor was at swords' points with his Legislature, and the bill did not pass, so that the instance sheds no light on the willingness of the legislative department thus to be advised, but the frankness with which legislative action was anticipated, is noteworthy.

In 1916 Governor McCall of Massachusetts recommended in his inaugural message various consolidations of commissions. A bill consolidating two of them in a certain manner passed the House. In the Senate a bill accomplishing a like result in another way was substituted, and a motion to return to the House bill was defeated by one vote. The next day (May 23) the attempt was repeated and was this time successful, largely, the reports said, through the fact that the President of the Senate took the floor, for the first time in the session, in behalf of the House bill. He and other speakers frankly declared themselves as voicing the Governor's wishes. An accurate State House reporter quoted the President as saying in his speech: "There have been this year very few so-called 'administration measures.' To-day we have before us an 'administration measure.' There can be no question about that. It is a measure that has grown out of a plank in the party platform that has come as a result of the inaugural message of His Excellency the Governor. However that message may have been interpreted in the past, however the sentiment may have been relative to the particular form of bill which should become law, there can be no question to-day that the 'administration measure' is the substitute measure that has been moved by the Senator from Suffolk. The question before this body to-day, before the partisan members of this body — if I may so designate it — is simply this. Are the members of the dominant party going to vote for a Republican measure, backed up by the leader of the Republican party, by virtue of his office, or are they going to vote against that measure because of certain outside influences which you and I know have been exerted in the passage of this legislation?"<sup>1</sup>

<sup>1</sup> *Boston Transcript*, May 23, 1916

Two years later Governor McCall sent to a member of the committee having under consideration a bill for the relief of the Boston Elevated Railway Company, a communication in which he denounced the section that would set up a perpetual contract. When the committee had reported the bill, the "Boston Transcript" (April 11, 1918) editorially declared that the member was right in saying the General Court should receive at once definite knowledge of the Governor's views on the bill. "The State," said the editor, "can desire no repetition of last year's fiasco, when the stand of the Governor, finally made known in the eleventh hour, overturned the whole course of the legislation then pending. This year there can be no excuse for the awkwardness of another such jolt."

Here surely was some progress, or the opposite, from the days when the General Court was supposed to make the laws and the Governor to execute them.

For another illustration of the trend of the times, take the course pursued by Governor A. W. Gilchrist of Florida, as he described it to the Governors' Conference of 1916 (*Proceedings*, 96): "I asked the Speaker of the House and the President of the Senate to appoint a committee on Governor's messages, and secured a chairman in each body in harmony with the Governor. Then I submitted thirty or forty propositions in messages, and drew up a bill on each of those subjects and put them into the Senate and House, often going before the committees myself. In that way the Governor has a very strong voice in the conduct of the Legislature."

In California, according to S. Gale Lowrie, responsibility for legislative appropriation is centered in the Governor through the exercise of his veto power. While it is true this control is exercised after rather than before legislative action, nevertheless, the desirability of securing the Governor's final assent to the legislative product makes it advisable to consult him at various stages in its course. His position as head of his party also places him in a position to command the situation. Even when the Governor and Legislature are of different political parties, the former has a dominant influence. The chairman of the Ways and Means committee of the Assembly, although named by the Speaker, is actually chosen by the Governor, and at each stage of the proceedings through the Legislature the Executive is frequently consulted, with respect to not only the

sum total of the appropriation but also the purposes of the proposed grants. The veto power is more frequently used with respect to the individual appropriation bills than the general appropriation measure; the control of the Executive over this latter measure in its legislative stages is so complete that the use of the veto power is almost never required. Mr. Lowrie says the power thus exercised by the Executive is generally approved by those familiar with the California system, as tending to centralize final control and responsibility.<sup>1</sup>

<sup>1</sup> "The Budget," Wisconsin State Board of Public Affairs, 1912, pp. 192-93.

## CHAPTER VIII

### RISE OF THE EXECUTIVE

ASSUME for a moment that the present elevation of the Executive at the expense of the Legislative is not merely one phase of a recurrent phenomenon, but is a stage in political evolution. On this basis let us consider what may have caused the change.

Some would give first place to the alleged weaknesses of American legislative bodies. It would be averred that they have greatly deteriorated, that they do not speedily and surely respond to public opinion, that they are inefficient, in other words do not speedily and surely get things done. It would be maintained that their members, representing localities, are engrossed by petty interests, often excel merely as errand boys for constituents, are unequal to large problems, take the narrow view. It would be declared that they are without sense of proportion, that they fail in the selection of measures, that they waste their time on details. Worst of all, it would be charged that many of them are corrupt.

These allegations I have already discussed. Here it suffices to recapitulate them, with the acknowledgment that whether rightfully or not, they carry weight with a large number of critics and perhaps with the greater part of the citizens who determine our destinies. Therefore even if the allegations were grossly unjust and wholly groundless, it would yet be necessary to accept as a fact the state of mind they have produced and to inquire what should be done.

However, it is not necessary to assume that legislatures have deteriorated or that the lawmakers of to-day are degenerate. Cleaner ground for debate is at hand in the fundamental characteristics of representative bodies, in the traits common to all, the best as well as the worst. Every truly representative body is composed of a considerable number of men, sometimes counted by hundreds. The real question is whether such bodies can or cannot legislate better than one man or a small group of men, that is, whether for purposes of lawmaking an autocracy is better than what we have hitherto usually meant by repre-

representative government. The form of autocracy here in mind is of course that which is elected and which retains power for but a few years. It may be a President or a Governor as with us, a ministry as in England and many other countries, but for our purposes will here always be presumed to be representative of the majority and responsible in the sense of being exposed to peaceable replacement.

It is to this matter of responsibility that the critics chiefly ask our attention. They say with truth and force that the members of a representative body chosen by districts are responsible only to their respective constituencies, to which they look for the reward of re-election or the punishment of defeat. It is averred that the inevitable and well-nigh irresistible tendency is for them to take the parochial point of view. One answer is that only in this way can the diverse interests and hopes of a people get even a rough representation. No one man and no small group of men can so nearly approach omniscience as to know what the millions of a great State really want or ought to have. Samuel W. McCall, after long experience in Congress, gave it as his opinion that "even if the influence of local interests may prevent the individual member from speaking for the whole country, after the clashing of localities and sections and the balancing of interests, the House as a whole speaks, and, more nearly than any other organ of the government, it utters the collective voice of the Nation. In these times no one man is great enough to do that."<sup>1</sup>

There is no denying, however, that the voter has no direct way of registering his approval or disapproval of the action of Congress or a Legislature as a whole. It is argued, therefore, that there will be gain in giving a President or Governor a share in legislation large enough to attach responsibility, so that the voter may reward or punish one man for the actual results. The palpable answer is that unless President or Governor is to be completely responsible, like the Prime Minister of England, nothing will have been gained. It is manifestly unfair to punish a President for the action or inaction of Congress. That has happened and to no good end. Furthermore the evils of divided responsibility are too well understood to call for discussion here. If any responsibility at all for lawmaking is to attach to the Executive, these evils must accrue unless we throw over-

<sup>1</sup> *The Business of Congress*, 189

board the American system and substitute the English amalgamation of powers, which there is no likelihood whatever of our doing. As long as our Presidents and Governors are elected for fixed terms, that would be impossible

Another allegation as to responsibility is based on the notion that the representative chosen by a district takes necessarily the narrow view. One writer goes so far as to say that the Governor "in his new role shapes the course of legislation for the general interest, instead of for private and special interests,"<sup>1</sup> the implication being that legislators advance only the interests that are private and special. This of course is quite unwarranted. Even though the majority may believe locality obligations paramount, that has no bearing on the great number of questions private or special that are not essentially local, unless it be by the encouragement of log-rolling, and in the matter of general laws no exception at all is ordinarily to be made. In every legislative body, too, there are always some men, usually among its leaders, who put the public welfare above local considerations. For example, the Congressman just quoted, Samuel W. McCall, served twenty years in Washington, and all through that time was conspicuous for putting the general welfare foremost. Attempts to replace him for this very reason, inspired by constituents who thought his district ought to be his first concern, were so generally frowned upon that they gained no importance. Like instances of patriotic performance of duty could be cited in numbers from every legislative body in the land.

Further it is declared that inasmuch as the really important laws are of general application, are broad and comprehensive in their scope, with policies their essence, responsibility for them should be centralized, not divided. The assumptions here are somewhat sweeping and peremptory. Their fault lies in the failure to discriminate between the conditions under national, State, and local government. Frederick A. Cleveland illustrated this when he was talking about the "Defects of our Constitutions" to the Economic Club of Boston, November 29, 1915. The use of the plural — "Constitutions" — in the title of his address shows that like most of the critics he probably had in mind both States and nation when he said "Neither a broad 'electorate' nor a great 'representative body' can act effectively or intelligently unless it has before it a definite well-considered

<sup>1</sup> John M. Mathews, "The New Stateism," *North American Review*, July, 1911.



plan or policy, and the one best qualified to prepare such a plan is the executive "

There may well be national policies. A President may urge a plan for the protection of industries, for the conservation of resources, for the development of a merchant marine. In the States there is much less occasion or opportunity for programs, that is to say, for a series of steps leading to a definite result broadly affecting the social relations. The questions are for the most part specific and unrelated, the only common exception being that of the aggregate of appropriations. In cities and towns it is absurd to talk of "policies," except again in the matter of parsimony, economy, or liberality. This is clearly shown by the functions of political parties, which have no valid reason for existence except as they advance policies and programs. There is little disposition to deny the worth of parties in national affairs. Their existence for State affairs is an open question, with the arguments about balancing. In local affairs the well-nigh universal opinion is that they are unnecessary or worse.

Party organization is our method for centralizing responsibility. Representatives in Congress and Legislatures are fractions of political parties, and we mostly secure responsibility from representatives by dealing out reward and punishment to parties in the mass. It must be admitted that this is not wholly satisfactory. It gives no certainty nor hardly a probability that the individual members of a legislative body who may be the real cause of bad legislation or who may prevent good legislation, will be turned out of office. On the other hand, with custom or law usually requiring that the representative shall live in the district he represents, the party system cannot ensure the retention of useful legislators, but often endangers their political careers through no fault of their own, for a political revolution sweeps out the good with the bad, the best with the worst.

Over against this is to be put the evident advantage of being able to reward and punish by concentrating judgment on one man or a small group of men. Furthermore it is probably true that an elected autocracy is more speedily responsive to public opinion than a large representative body chosen by districts. That it is more accurately responsive, is doubtful. Were only one issue involved in an election, there would be no doubt, but this takes place only when some great crisis such as that of war

focuses public thought. The moment you get beyond one question, uncertainty begins, for it is altogether improbable that all the individuals of any sizable group will agree on two questions at the same time. The more the questions, the greater the diversity of opinion. This is notorious in the matter of political platforms. A striking illustration was given by the Progressive Party of 1912 with more than half a hundred propositions in its program. It was absurd, preposterous, to suppose anything like unity of belief. The heterogeneous conglomeration foredoomed the movement to failure. Can it be imagined that a vote for a candidate under such conditions gives him any definite mandate whatever? Can it be supposed because he is elected there is any assurance that on any one question the outcome demonstrates the popular will?

A like doubt may be cast on the significance of the election of a body of legislators. Indeed under normal conditions the transmission of the public will by voting for men is always uncertain, whether the choice be of one or many. It may well be argued, however, that what the majority want on diverse matters is more likely to be shown by the choice of many representatives than by the choice of one spokesman. Each of the many representatives will have been exposed to the subtle, compelling influences of his particular associations. It is likely that the mind of each will run in the same channels as the minds of a majority of his constituents. The farmer is likely to think like other farmers, the artisan like other artisans, the lawyer like other lawyers. Some representatives with future preferment in mind will deliberately try to find out what their neighbors want, others will unconsciously reflect their environment. Only occasionally will one man with exceptional powers of assimilation gauge public opinion on many matters. Such have been great statesmen. They are few.

But can we assume that a great statesman is to be nothing but a mirror to reflect popular emotions and judgments, fancies and hopes? Is the statesman to follow or to lead? Here we come to the sound basis for the argument in favor of the executive initiative, or in its last analysis lawmaking by one man. It is not the case that the multitude have clear-cut political beliefs on more than one or two subjects at any one time. Their views come from without, not from within. Place opposing arguments before them and they may decide with more or less wisdom, like a

jury, but usually they know in advance no more than a jury about the issue to be decided. Thus it is that makes all-important the factor of leadership.

Furthermore, men in the mass do not merely accept leaders; they want leaders, ask for leaders, demand leaders. It cannot be denied that the great majority of men prefer somebody else to think for them. This is to be seen in any club, society, company, or other form of social grouping, every day of our lives. It is to be seen in the power of the clergyman, the orator, the editor. Countless citizens merely think what their favorite newspaper thinks. Countless others accept implicitly the judgments of some statesman in whom they have confidence. He says it is so and therefore it is so. Thereby the leaders mould public opinion.

Will the members of a legislative body do this more usefully than a lawmaking autocrat?

Here the argument is all for the autocrat. A debating society can successfully lead neither an army of warriors nor an army of voters. Unless it is itself led, dominated, it will fail miserably. For the extreme proof, read the story of our Continental Congress, of the National Assembly in the French Revolution, of the attempts at lawmaking in the recent Russian Revolution. For milder illustrations, enter any legislative hall in the United States. Call it leadership if you are an optimist, bossism if you are a pessimist — no matter what the name, it is inevitable because the strength and weakness of human nature are inevitable.

In such logic is there any stopping place short of the conclusion that the mass of mankind prefers despotism, and that democracy is abnormal? Can it be that our American ideal was but a dream? Is it true as one writer has said that "when we elect a President, we elect a man whom the majority believe to be wise enough, and strong enough to rule a nation"?<sup>1</sup> Or as another has said, that "public policy and legislation must be dictated from some quarter, and it is undeniably better that this dictatorship should rest with the Governor, in close touch with the people and working for the interests of all, than with the lobbyists and the representatives of privilege and plutocracy"?<sup>2</sup> Are we to reason from the trend of events in the latest generation that we really want precisely what England has — a re-

<sup>1</sup> G. A. Alger, "Executive Aggression," *Atlantic Monthly*, November, 1908.

<sup>2</sup> John M. Mathews, "The New Stateism," *North American Review*, July, 1911.

sponsible despot? He masquerades under the name of Prime Minister, but despot he is, whatever the name, differing from despots of old only in that his power ends at the popular will, instead of with death or revolution. Will it be said that democracy is the power to replace a despot by majority vote?

To be sure, that is a harsh way of putting it, but where is the flaw of the logic?

It has a flaw. It assumes that the Executive who controls legislation can and will control all legislation, whereas although that is theoretically possible under the system of executive or ministerial responsibility, it never actually takes place. Constitutional restraints prevent the arbitrary exercise of power. Furthermore, the individual Executive has not strength, has not time, has not inclination to concern himself personally with much of legislation. As a matter of fact the most aggressive President or Governor interests himself only in the few proposals that are spectacular. The great mass of measures in which no widespread interest can be aroused, he may be presumed to affect indirectly through his administrative associates — "the Administration" — but it would be extreme to say that for this reason representative government does not exist in England or is likely to disappear in the United States. The problem is rather one of degree. The practical question is how far it is wise to take away from representative bodies the initiation of policies and how far we shall go in giving to one man the power to impress on such bodies the views he may entertain in respect to policies.

Manifestly the one-man theory has the advantage of promising definite knowledge as to policies. Offers, promises, guarantees are shown by experience to be of far more value when made by an individual than when made by a group. With a district system of election, it is impracticable to ensure that each and every member of a Congress or Legislature will vote as we have been led to expect. When the tariff is an issue, there are always some protectionist Democrats in Congress, some Republicans who are at heart free traders. The ignoring of party platforms on minor matters is notorious. Furthermore, the fact that the word "policy" always suggests to the mind the idea of a person or small group of persons, shows that we do not naturally associate it with the course pursued by a large body. In other words, we do not expect a Congress or a Legislature to have a policy.

Therefore the election of President or Governor does in fact let us pass judgment on policies as we cannot when electing members of Congress or a Legislature.

On the other hand, since the "policies" promised by President or Governor concern but a small part of either the legislative or executive field, they really are by comparison a minor matter. Does not the experience of mankind warrant the belief that it is better to have a wise lawmaker who has given no promises, than an unwise lawmaker who fulfills a few good promises? Of course the weak spot in the one-man theory is that you are never sure the one man will be wise and honest, intelligent and just. It is possible that on studying the whole range of political history, it might be found that the Legislative has more often than the Executive excelled in those qualities that enure to the happiness, prosperity, and safety of the people. Experience has taught mankind the danger of indulging too far the hope that autocrats will invariably be of the wisest and best.

Also men have learned that no one man is equal to all the burden of governing. Especially has this come to be the case since government has attained modern complexity. It is out of the question that an Executive now shall have personal knowledge of a tithe, perhaps even a hundredth part, of the legislative problems. The demands on the time of a State Executive made by the pomp and parade of his office, by social functions, by innumerable gatherings where his attendance is expected, to say nothing of appointments to place and of political relations, leave little chance for study or reflection. A President is still more harassed. This furnishes perhaps the biggest practical objection to imposing on him a greater share in lawmaking.

Legislatures also are now grievously overworked, but the wise remedy is to take away from them the thousand trivial or inappropriate tasks that burden them, rather than to turn over to the Executive their really important functions. To cut off their duties at the top rather than the bottom, would so belittle and degrade them that they would be even less attractive than now to strong men. Already confidence in our lawmaking bodies wanes. This is one of the chief reasons why men turn to the Executive with hope. It is said the public has confidence in President or Governor, not in Congress or Legislature. If there is ground for this, it is to be found in the palpable fact that initiative, study, verified information, intelligent debate are

to-day none too common among our lawmakers. Can lessening the incentive to these things fail to make a bad situation worse? Will we not jump out of the frying-pan into the fire?

Not alone is the effect on legislatures to be considered. Of even more importance is the effect on the electorate. Just so far as you diminish the importance of legislatures, you diminish the public interest in legislation, not perhaps in the matter of a few big questions, but in the matter of the great mass of working problems that really most concern the welfare of society. Something is still to be said for a keen, active interest by the citizen in the details of public affairs. Governor Willis of Ohio voiced sound American doctrine when in one of his messages he declared, "Efficiency is important, self-government is vital." And he was right when he said, "Freedom and the strength of civic character which come only from the exercise of self-government are paramount to efficiency." Let us not pay too high a price for the advantages that may come from executive responsibility.

#### DANGERS AND PROBABILITIES

To disturb the balance of power has an element of real danger. Nowadays it is the fashion to refer with some disdain to the system of "checks and balances" devised by our fathers. Yet it had a sound basis. Just as in Nature if the centrifugal force prevailed we should all fly off into space, and if the centripetal force were greater we should walk with leaden feet, but by their balance we keep on earth and yet move freely, so it may be that by balancing the executive and legislative branches we preserve the political equilibrium necessary for the maintenance of the Republic.

May it not be fortunate that in politics as in Nature two forces are always pulling against each other? On the whole may not more good than harm result from the perpetual struggle between Congress and the President, between Legislatures and Governors? Wise progress comes from conflict. Unanimity is always dangerous. An infinitude of human experience is behind the belief that discussion, criticism, opposition conduce to sound conclusion. This alone would justify the balancing of the powers, the offsetting of one against the other.

If this be true, then we should throw away a distinct advantage by copying England in amalgamating the Executive

and the Legislative. Rather ought we to bend our energies toward perfecting the balance.

Left to itself, human nature will work to that end. Experience shows it to be wholly natural that Legislative and Executive shall be in open conflict, or at any rate each in hostile attitude. When Governor Andrew was at odds with the Massachusetts General Court, "Warrington," a journalist of long experience, said he had never yet known a Governor popular with the Legislature, or a Legislature popular with the Governor, at least after the first year of the gubernatorial term. Many a President has been the most unpopular man in Washington.

At the same time President or Governor has almost invariably the great advantage of popularity with the people. This in part he gets because they look on him as "the under dog." Everybody sympathizes with one man who is fighting against many, whether he be right or wrong. Furthermore he can get the public ear. The newspapers will print what he says, and it is sure to be read. Curiosity leads multitudes to flock to hear a President when he speaks, and usually a Governor gets larger audiences than anybody else in his State. On the other hand the words of legislators usually fall on deaf ears. Newspapers will rarely print them. Rarely can one legislator speak with authority for the rest. Rarely do the sentiments of legislators travel far beyond their chamber.

The result is that self-interest, the most powerful of the motives actuating mortals, spurs President or Governor toward battle much more than it spurs the legislator. That does not necessarily imply anything obnoxious. Were it not for ambition, the world would stagnate, progress would cease. All of us are influenced by a mixture of motives. Even the clergyman must get a living as well as preach the word of God, and we rightly hold it laudable for him to wish and seek as large a hearing as he can get. It is well that statesmen desire the plaudits of their fellows. If they do not deceive the public, if they are sincere and high-minded and patriotic, there is every reason why they should use public opinion for all the power it may give them, and there is no reason why the process should not accrue to their own advancement and reward.

It is to the force of public opinion, which they can thus easily mould, that Executives must chiefly resort to sway legislation under a form of government like ours. The extensive use of

this force in the last few years by some exceptionally vigorous Executives has led various observers to think it a new factor in our public life. Yet Jefferson and Jackson used it to precisely the same purpose. If it is more effective to-day, which is not clear, the reason is to be found in the growth of the press.

As an asset peculiar to the Executive, the importance of public opinion may be exaggerated. Finley and Sanderson, for "The American Executive" (pp. 181-83), secured from fourteen Governors in 1908 opinions about executive initiating in legislation. "While all these *ex parte* answers," they say, "indicate with one or two exceptions a disposition on the part of legislation to follow executive suggestion, it is apparent even from these letters that it is not a servile following, and it is plainly stated or intimated by two or three that they both follow an imperative public opinion, the Governor having the first opportunity to respond, and so giving unintentionally the impression of leading, whereas he, too, but follows."

In spite of the advantages brought to President or Governor by influence over public opinion, by the veto power, by the use of patronage, and by the prestige of office, in spite of the wide approval given at the present moment to unhesitating use of these advantages for executive aggrandizement, it is far from certain that the legislative branch is not still the more powerful of the two. During the great part of our national history, the prevailing fear has been of the legislative. Only under Jefferson and Jackson in our first century were there serious misgivings about the executive power. Congress may have been restless under other Presidents, but as a matter of fact it held the whip hand. Indeed, Mr. Justice Miller, delivering the opinion of the Supreme Court in the case of *Kilbourn v. Thompson* (103 U.S. 168-1880), said with the cautious under-statement so characteristic of judicial utterances, all the more impressive because of its moderation: "While the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success." And the court went on to show that the legislative branch, as the most powerful, was least liable to encroachment, and on the other hand that its own encroachments on the others were least likely to meet with disfavor.



To be sure, at this writing the tide seems to be running all the other way. The well-nigh universal glorification of executive responsibility, the development of executive budgets, the proposal to apply the commission form of government to the States — these and a hundred other signs would lead a stranger among us to think lawmaking representatives doomed to disappear, or at least to dwindle into puppets. Yet the safer prophecy is that in the long run the legislative branch will maintain itself.

It has the inestimable advantage of first place. "In the normal process the inception of political and civil action is in the Legislature. It is not the power which executes the law, nor the power which interprets the law in adjudging cases under the law but the power which in its nature can enact its will as law, that in the formative process is precedent."<sup>1</sup> Perhaps we shall see change in the form of manifesting the will. Perhaps legislatures will give way to plebiscites. Direct legislation by means of more extensive use of the Initiative and Referendum may be the next device, or some other machinery may be developed. But whether the processes are old or new, the legislative branch will for the most part dominate the executive, unless we complete the circle and return to autocracy.

Paradoxical though it may seem, there are those who argue that more power to the Executive may postpone the day of autocracy. Professor J. W. Burgess contends that parliamentary government, i.e. government in which the other departments are subject to legislative control, becomes intensely radical under universal suffrage, and will remain so until the character of the masses becomes so perfect as to make the form of government very nearly a matter of indifference. "There is no doubt," he says, "that we sometimes feel embarrassment from a conflict of opinion between the independent Executive and the Legislature, but this embarrassment must generally result in the adoption of the more conservative course, which is far less dangerous than the course of radical experimentation."<sup>2</sup> It is, however, not easy to reconcile such doctrine with the palpable fact that those Americans who are to-day urging greater power for Executives, almost invariably buttress their arguments with promises that their program will speed the fruition of radical innovations and will hasten the millennium.

<sup>1</sup> Elsha Mulford, *The Nation*, 198

<sup>2</sup> *Political Science Quarterly*, x, 420.

Let not the pleasures of theorizing about these things, blind the eyes to some practical considerations. There is danger that overmuch worship of theory, overmuch dread of tendencies, may interfere with immediate results that are worth while. The most zealous advocate of separating the powers ought to recognize that they cannot be and ought not to be wholly separated. The statesmen who wrote our Constitutions knew that "the letter killeth." Said Madison in Number 47 of the *Federalist*: "If we look into the Constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." The Massachusetts courts have refused to give literal and extreme force to the doctrine. In *Commonwealth v. Kirby* (2 Cush 577-1849) it was said. "The provisions of this article are general in their terms, expressive only of a principle, and not intended to mark with precision the incompatibility of different offices."

The fact is that the separation of the powers is an unattainable ideal, to be approached but not reached. Indeed its attainment would be disastrous. Practical considerations of convenience amply justify such commingling of powers as we find in the executive veto, in the power to recommend, to call special sessions and specify their programs, to change the place of meeting, to prorogue, to issue election writs, and the like.

An eminent German authority, Bluntschli, went so far as to take the Montesquieu doctrine wholly out of the realm of metaphysics. He thought "the decisive reason for such specialization [i.e. the separation of powers] is not the practical security of civil liberty, but the organic reason that every function will be better fulfilled if its organ is specially directed to this particular end than if quite different functions are assigned to the same organ."<sup>1</sup> Such logic at any rate justifies the iconoclasts of the day in disowning the trinity of powers and trying to replace it with a division into four, by adding the administrative. Still others aver there are only two powers of government, one that expresses the popular will, and the other that carries it into effect. However, what might be or ought to be the classification has little direct significance for men living under American Constitutions.

<sup>1</sup> *Allgemeine Staatslehre*, bk. II, ch. 7

Our courts determine the situation for us by holding in effect that our frame of government is tri-une. No one of the three recognized departments is to go beyond the accepted limits without express constitutional permission. All Constitutions permit some degree of transgression. Thereby they recognize that transgression is a matter of convenience and not of basic principle. Therefore, too, when constitutional revision is in issue, the degree of further deviation is matter of expediency.

It is altogether probable that though the temporary exaggeration of executive influence will not long resist the impulses of democracy, we shall work out closer relationships between the executive and the legislative branches. Academic advocates of this rarely as yet come down to earth and give us a definite program of how it is to be done. Albert M. Kales, Professor of Law in Northwestern University, has been bolder than most of his fellows, and has set forth his scheme with some detail in a book, "Unpopular Government in the United States" (Chicago University Press, 1914). "Our first care," he says, "must be to eliminate the division of power which comes from having two legislative chambers." That would, of course, be feasible. Also it would be feasible to take his next step — a single Executive, secured by carrying the Short Ballot program to its extreme conclusion and electing only a Governor, besides the Legislature. Next he invites trouble for his theory by agreeing that there are sound reasons why the Governor should not be chosen by the Legislature, the one appealing to him most being the chance of serious deadlocks if the Legislature chose. He plunges rashly into difficulties when he goes on to say "The control of all executive acts must be placed in the hands of a Council of State, to be composed of (let us say) seven members, who should usually be drawn from the leaders of the regularly voting majority of the legislative chamber." Once the Council of State is selected, the actual control of the executive function will reside in it, for the Constitution is to specify that all the executive power it gives is to be exercised by the Governor, "acting with the advice of the Executive Council." The members of this Council are to be made heads of departments, and they are to be members of the Legislature when appointed or to become such within three months. They are to be appointed by the Governor.

Here Professor Kales nimbly jumps obstacles. "The election

which put the Governor in office," he says, "might be expected to put a majority of the same party in the Legislature, and the Executive Council would naturally be selected from the leaders of that majority." Now as an actual fact in Massachusetts from 1891 to 1915 inclusive with twenty-five Republican Legislatures, usually overwhelmingly Republican, nine times the voters chose to elect the Democratic nominee for Governor

The possibility of that sort of happening does not, however, seriously disturb Professor Kales "Even if the Governor and the majority of the Legislature belonged to different parties," he goes on to say, "yet there would be the strongest motive for the selection of an Executive Council from the majority of the Legislature, thus avoiding the responsibility for a contest between the majority in the Legislature and the Executive which would throw the government into confusion "

It happens that such a contest is just what an ambitious Executive most craves In such a contest his personal fortunes are sure to win. Such a contest sends him to the United States Senate, or makes him a candidate for the Presidency.

Professor Kales entirely overlooks the fact that a Governor has everything to gain and nothing to lose by quarreling with a Legislature of opposite political faith. Furthermore, it is his party duty to do just that thing He has a right to assume that he was elected for that very purpose, or at any rate such is the partisan theory If like Antaeus of old he is to gain new strength every time he is thrown to the ground, how absurd is it to suppose that he will try to avoid the responsibility for the contests! And what possible motive could he have for choosing a Council from among his partisan opponents? Professor Kales said he would have "the strongest motive" to do it, the fact is he would have the strongest motive not to do it What would his party say if he distributed all the loaves and fishes of the departments among his foes? What would be his own plight if he surrounded himself with men not of his own political faith?

Nor would the situation be helped if the Constitution ordered him to name his Council from the legislative majority. Indeed, the situation would be worse, for it would lead him to choose weak men, men with whom he could trade, men whom he could coerce or cajole This follows again and again when State Constitutions or city charters compel the appointment of bi-partisan boards. Appointees from opposition parties are too

often subservient weaklings. It is always to the selfish interest of the appointing power that they shall be such. Why name a man who will make trouble when you can get a man who will keep still?

Furthermore, how can it be ensured that there will be any majority at all in the Legislature? The certainty of majorities implies the existence of but two parties. In this very chapter of Professor Kales, he suggests the use of the Hare plan, the prime purpose of which is to secure the representation of all considerable factions. Its application would greatly increase the likelihood of legislative groups rather than parties, with the complications that have made the English Cabinet system so hard to work in Continental Parliaments.

All details apart, the incurable weakness of such plans as those of Professor Kales is that they furnish no means of coercing the Executive. So long as his tenure of office is secure, and depends only on a popular vote taken at fixed intervals, he can be held responsible only at those intervals. Thus it is, of course, that puts the introduction of the English cabinet system out of the question.

Less vulnerable seems to me the suggestion of S. Gale Lowrie. He raises the question of whether it may not be preferable to centralize the power of control in a legislative committee rather than in the Governor. A committee of the Legislature, organized to sit throughout the time for which the Legislature is elected, could act in many ways as the Cabinet does in parliamentary countries. Bills could be prepared and policies digested before the session of the Legislature convenes. When the Governor is in sympathy with the Legislature, he will, of course, take a leading part in this committee work and be a dominant factor therein, but when not in sympathy with the controlling party, he is not in a position to block the work of those in actual control. For this reason it might be well were the percentage required to override the Governor's veto upon reduced items to a majority of those elected to each House.<sup>1</sup>

Such a plan would recognize the condition that now unduly enlarges executive opportunity to shape legislation. Ex-Governor J. F. Fort of New Jersey told the Economic Club of Boston, November 29, 1915, how it worked in his State. Said he: "I undertake to say that two thirds of all the bills — I will make

<sup>1</sup> *The Budget*, Wis. St. Bd. of Public Affairs, 1912, pp. 99-100.

it one half for safety — of all the bills that went into the Legislature while I was Governor of New Jersey, which bore on any subject of general importance, were submitted to me before they went to the Legislature. I said to them, 'This is wrong, you should go to the committees' They said, 'No, we want to know what you think about this' They go to the Governor with their bill And why? Because they cannot go to the whole Legislature about it If the Governor says to them, 'I won't exercise my influence to help legislation,' 'Well, never mind,' they say, 'we want to know that this bill is what it ought to be, and that you will stand for it' They would go to the Legislature in the same way if it were smaller, and they thought that it could be held responsible in the same way that the Governor is "

Such a situation does not prevail in Massachusetts, at least to any such degree, and maybe not in many other States, but it is a situation toward which all that have not reached it, are tending. This shows itself in the pressure brought to bear on Senates, not because they are weaker bodies, but because they are smaller bodies It is a question of convenience. Recognizing this, may we not presently come with wisdom to open recognition of legislative leadership? Already it has been in part accomplished in Congress by the authority given to the Committee on Rules, and in some Legislatures to like committees Development of this would further efficiency without at all interfering with that separation of Executive and Legislative which has proved so useful a safeguard against tyranny.

There remains to be considered the proposal to avoid the dangers of one-man power and also the evils of dividing responsibility among the members of a large legislative body, by combining executive and legislative power in a small body. This has come to be known as the commission form of government It was first applied to Galveston, Texas, in 1901, after a tidal wave had almost destroyed that city, making heroic treatment of its affairs imperative The exceptional need led the people to petition the Legislature that the municipal administration be put in the hands of a small board of business men So successful was the experiment that in 1905 Houston, in the same State, adopted the plan, two years later it was copied by Des Moines, Iowa, and then it spread so rapidly that within twenty years nearly 500 municipalities came to be operating under commission government

The membership of the commissions varies from three to seven, five being the most common number. In them it was the original intention to concentrate all legislative and executive functions. The danger of this was seen by the Bureau of Municipal Research, which voiced the "grave apprehension that the venture will not prove permanently satisfactory, because it deprives the community of an independent representative agency or branch of government charged with responsibility for review and criticism" <sup>1</sup>. Discontent with the system resulted in a movement for reintroducing the separate executive by providing for what is called a "City Manager". This idea came to the front first in Staunton, Va., in 1908, was applied by Sumter, S. Ca., in 1913, and then, following the flood in Dayton, Ohio, was there adopted with results attracting so much attention and approval that in May of 1921 the plan had come into use in 163 places, and in December of 1932 there were 445 communities with true City Managers, besides 165 with officials so-called but with very limited powers.

The experience with the Commission and City Manager forms of government throws new light on the separation of powers. Here we see speedy development of the dangers inherent in charging the same men with the making and the executing of laws, followed by prompt revival of the separated-executive system that theorists thought doomed to abandonment. History might have foretold this. Whether the Doges of Venice or any of a dozen other famous councils that might be cited, always the story has been the same, a story of ultimate disaster when a small body of men both enact and enforce.

The realization of this is likely to prevent the spread of the commission idea to State governments, in spite of a considerable demand for it in some of the Western and Southern States. Much more hopeful is the possibility of development suggested by the City Manager plan. In general this plan contemplates a single Executive, with two Legislatures, one a small body, say of five commissioners, the other the electorate at large, speaking by town meeting or by the Initiative and Referendum. It may be that something of this sort will presently commend itself for States — policies to be determined in broad outline by the electorate, general laws to be made by a large body of

<sup>1</sup> *The Const. and Govt. of the State of New York*, 52 (May, 1915)

representatives, administrative laws by a small body, and the execution to be entrusted as now to one man. A proposal looking in this direction was submitted to the Massachusetts Convention of 1917. It was suggested that administrative lawmaking be entrusted to the Senate or to the Governor's Council. The idea did not meet with acceptance, partly no doubt because of the disfavor into which all American Senates and Executive Councils have fallen. Everywhere it has been found dangerous to give bodies of small size unlimited chance to obstruct and prevent changes in general laws. There lies one of the reasons for the spread of the Initiative and Referendum. Sooner or later, however, the people of the United States will come to understand as is now understood everywhere else, that there is essential difference between general and special legislation, and also that the determination of a policy and the arranging of its administrative details are two separate things. Then we shall get a rational system of lawmaking on a scientific basis, with each of its processes performed by the body most fitted for it, and with the execution of the law an independent function.

This is the exact reverse of executive responsibility, the Cabinet system, or whatever the form. It recognizes that law must be the embodiment of the common will. It works from the bottom up instead of from the top down. It is democracy, not autocracy. It is American, not English.

#### EXECUTIVE INITIATIVE

It has never, so far as I have observed, been the practice to forbid the Executive to suggest to the Legislative things it should do. On the contrary suggestion has always been a normal procedure. The reasons are to be found in origins. When chiefs or monarchs had to get their wishes approved by a lawmaking body, whether a gathering of the warriors as among the Germanic tribes, or a Senate as in Rome, of course they had to give expression to those wishes. The development under the Roman Emperors is instructive. Augustus had a cabinet, virtually a standing committee of the Senate. The measures it discussed and adopted were promulgated to the full body, which accepted them by acclamation. Tiberius did not retain this select council. His measures, Merivale tells us, emanated from his own breast alone, except when he chose to take a private



counsellor, such as Sejanus, into his confidence. He convened the fathers to listen to an address from his own mouth, in which he explained the scope of his plans, and proposed them for the assembly's consideration, or he put up some private member to make the proposition, when he chose to disguise his own inclinations. He introduced also the custom of sending a written despatch to be read to the assembly in his absence, in which his views on any project of law, proposed by himself or by another, were declared or insinuated. But in all these cases the Senate was regarded as competent to discuss and amend, and even, if it had the courage, to reject, though the latter alternative may never have been actually assumed. Many instances, however, are recorded of individual Senators arguing upon the imperial proposition, and even condemning it, and, at least at the commencement of the Tiberian principate, it was deemed a refinement of flattery to affect such freedom of discussion. This, perhaps, is the limit to which the imperial authority extended in the matter of legislation at this period, it was practically complete, but in outward show reached only to recommendation<sup>1</sup>

When in England Parliaments began, it was necessary for the King to inform them why they were summoned. Hence the "Speech from the Throne" that opens the business of every Parliament. Formerly this was likely to be a vigorous address charged with exhortation or suited to the prospects of the session. Nowadays it consists of formal statements as to the foreign relations of the country, communications of topics of legislation to be proposed by Ministers, and remarks on the condition of trade or other colorless topics.

At the outset the presence of the King himself was deemed necessary at the opening and generally at the end of the session, but he rarely spoke, as far as the records show, instead disclosing his views through his Chancellor. Stubbs says it was in 1363, after Edward III had been more than thirty years on the throne, that we find him first making his will known to the Commons by his own mouth. Richard II is said to have uttered haughty words in Parliament more than once. The succeeding Kings took a still more prominent part. They spoke in full Parliament, that is, in the presence of both Houses, or in the House of Lords, but not to the Commons by themselves. The

<sup>1</sup> *History of the Romans under the Empire*, v, 105.

presence of the King at the deliberations of the Commons was always deemed inappropriate. Only once has the King violated the unwritten law. That was when Charles I, in January of 1641-42, made his way with an armed escort into the House, hoping to arrest the five members whom he had charged with high treason.

On the other hand the presence of the King in the House of Lords was long accepted as natural, for as late as the reign of Henry IV, at any rate, the Lords had still so much of the quality of the King's Council that the attendance of the monarch may have been thought necessary to the due transaction of business. By the time of Charles II, however, this had been so far forgotten that the Lords were in doubt as to what work might be done in the presence of the King. Once Charles II came in unexpectedly when the House was sitting in Committee, whereupon the sitting of the House was resumed, but the King said he was come "to renew a custom of his predecessors long discontinued, to be present at debates but not to interrupt the freedom thereof"; and therefore he desired the Lords to sit down, and put on their hats, and proceed with their business. So "the Lords again taking their places and putting on their hats the House again adjourned into a Committee during pleasure."<sup>1</sup>

Evidently Charles enjoyed the privilege he revived, for he attended as many as forty-three out of eighty-nine debates in the session of 1672-73. That he was no mere by-stander may be gathered from the way he rebuked the Lords once, desiring them "not to prophane such a presence as this with the like disorder, but keep their places and proceed in business according to their orders prescribed in the House."<sup>2</sup>

With George I, who did not understand English, visits of the monarch to the House of Lords were abandoned. Since his time it has been understood that the King attends Parliament only for the ceremonial opening and closing of the session.

Technically nothing stands in the way of attendance by American President or Governor at sessions of Congress or the Legislature. In colonial days this was in fact accomplished wherever the Governor sat with his Council acting as the upper of the legislative branches. Doubtless it was the recollection of this that led the authors of the Constitution rejected by Massachusetts in 1778 to provide that the Governor and Lieutenant-

<sup>1</sup> 12 *Lords' Journal*, 318

<sup>2</sup> *Ibid.*, 413.

Governor should, *ex officio*, have seats in the Senate. The Governor was to have no negative, as Governor, in any matter pointed out by the Constitution as to be done by the Governor and Senate, but was to have an equal voice with any Senator on any question before them; "provided that the Governor, or, in his absence out of the State, the Lieutenant-Governor shall be present in Senate to enable them to proceed on the business assigned them by this Constitution, as Governor and Senate." As a matter of fact there was very little to be done by "the Governor and Senate" — nothing but some of the appointments to office and the work of courts of impeachment. Yet this infringement of the doctrine of the separation of powers furnished one of the cogent arguments that led the people to reject the Constitution by an overwhelming vote. To-day the mere presence of the Executive would not in and of itself be held objectionable in Massachusetts, if we are to take at its face value the specific inclusion of the Governor and Lieutenant-Governor in the list of persons named by the House rule as entitled to admission to the floor. Likewise the rule of the national House names the President as one of the persons who may be admitted.

In our day Americans have again had experience with the presence of colonial Governors in legislative bodies, this time themselves furnishing the Governors. William H. Taft had been one of them. When before a committee of the New York Constitutional Convention, June 10, 1915, he was asked whether he found in the Philippines that his presence in the legislative branch while he was the Chief Executive, worked well or ill, he answered: "I thought it worked well. I have no nightmare about this union of the legislative and the executive. I think it is not well to be dogmatic on such a proposition. I think one of the difficulties we find in our government is the rigid exclusion or the attempt to make a rigid separation between the two, and I think there might be greater union, with greater efficiency in the matter of government on the one hand, and greater economy."<sup>1</sup>

A proposal to give the Governor a seat in a State Legislature was embodied in a group of proposals submitted to the people of Oregon in 1912 and again in 1914 by use of the Initiative. The combination was defeated, but no inference can be drawn

<sup>1</sup> N Y Conv Doc No 11, p 26.

as to whether this particular idea was obnoxious to the majority of the voters. One curious feature of the program, by the way, was the proposal to seat in the Legislature defeated candidates for the office of Governor, as leaders of the opposition.

In the earliest days of our republic it came near being established that the President might attend in Congress and express to it his views. John Quincy Adams says in his invaluable *Diary* that at a cabinet meeting, November 10, 1824, "Mr. Crawford told twice over the story of President Washington's having at an early period of the Administration gone to the Senate with a project of a treaty to be negotiated, and been present at their deliberations upon it. They debated it and proposed alterations, so that when Washington left the Senate-chamber he said he would be damned if he ever went there again."<sup>1</sup> Had Washington's sense of dignity not been outraged and had his temper been less inflammable, it might never have come to seem unfitting for a President to discuss questions of public policy with Congress.

Colonial records throw scant light on the beginnings of inaugural addresses in America, but it is probable that the Governors commonly made some sort of formal speech when the Assemblies gathered, outlining to them the work in hand. We find that the commission of John Cutt, constituting a President and Council for New Hampshire, in 1680, contained this provision: "At the 1st meeting of which General Assembly We do hereby will, authorize & require the President of the said Council, to mind them in the general, what is to be intimated in the proclamae'on aforesaid: That he recom'end unto them the making of such Acts, Laws, & Ordinances, as may most tend to the establishing them in obedience to Our authority, their own preservation in peace & good Government & defence against their enemies. & that they do consider of the fittest ways for the raising of taxes, & in such proportion, as may be fit for the support of the Government."

In New York the custom of having the Governor make a speech to the Assembly at its opening began in 1691. The Constitution framed in 1777 said "It shall be the duty of the Governor to inform the Legislature, at every session, of the condition of the State, so far as may respect his department, to recommend such matters to their consideration as shall

<sup>1</sup> John Quincy Adams, *Diary*, VI, 427.

appear to him to concern its good government, welfare, and prosperity", etc. The Constitution of 1821 directed that the Governor should "communicate by message to the Legislature at every session, the condition of the State, and recommend such matters to them as he shall deem expedient."

The Pennsylvania Constitution of 1776 directed the President (as the Governor was there at first called) with the Council "to prepare such business as may appear to them necessary to lay before the General Assembly." The direction was omitted from the Constitution of 1790. Meantime it was copied by Vermont, which has kept it with only the change made necessary by the abolition of the Council. The Constitutions of Massachusetts, New Hampshire, Rhode Island, and Arizona, do not give the Governor specific authority to address the Legislature, but custom has established the practice. In all the other States specific authority to recommend is given.

The usage of Parliament called for a reply to the Speech from the Throne, and this was copied in the colonies. Before the Revolutionary War the Governor's Address and the Reply had degenerated into a partisan affair, often acrimonious, with slight bearing on the actual work of legislation. In Massachusetts the custom of a Reply was abandoned after the death of Governor Eustis, in 1825. I am not aware that the custom now prevails anywhere in the United States. Perhaps it might have survived if Constitution writers had taken such precaution as is found in the Constitution of the Netherlands. A citizen of the New World, unaccustomed to the traditions and courtesies of a monarchical state, may be forgiven a smile at the Dutch provision: "When the Lower House decides not to adopt a proposition [recommended by the King], it shall make known the fact to the King in the following words: 'The Lower House of the States-General expresses its thanks to the King for his zeal in promoting the interests of the State, and respectfully requests him to take his proposition under further consideration.'"

The Constitutions of half a dozen of our States require that the Governor at the end of his term of office shall give the Assembly information as to the condition of the State. For example, Nebraska, which began (1866) by saying, "He shall communicate at every session, by message, to the Legislature the condition of the State, and recommend such measures as

he shall deem expedient," in 1875 changed this to read: "The Governor shall, at the commencement of each session, and at the close of his term of office, and whenever the Legislature may require, give to the Legislature information by message of the condition of the State, and shall recommend such measures as he shall deem expedient."

The tendency is toward giving the Governor a larger share in directing or controlling the financial program. In at least ten States he is now required by the Constitution to present at the beginning of each session estimates of the amount of money to be raised by taxation, and the adoption of budget systems is rapidly adding to the number of States where the same thing is accomplished under statutory warrant. In Alabama the Governor, Auditor, and Attorney General are required by the Constitution to prepare the general revenue bill.

In Minnesota no new bill is to be introduced in either House in the last twenty days of the session except on written request of the Governor or unless by special message he calls attention to some important matter of general interest. In Nebraska after the first twenty days of the session no new bill (other than general appropriation bills) can be introduced unless the Governor by special message calls attention to the necessity of passing a law on the subject matter of the message.

The Maryland provision against the passage of local or special laws in certain enumerated cases, concludes — "unless recommended by the Governor or officers of the Treasury Department."

When the Federal Convention of 1787 met, only Pennsylvania and New York had formally recognized a share on the part of the Executive in the initiating of laws. Pennsylvania said the Governor and Council were "to prepare such business as may seem to them necessary", New York said the Governor was "to inform the Legislature of the condition of the State, so far as may respect his department, to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity." Charles Pinckney combined parts of these in the draft he laid before the Federal Convention early in its deliberations, saying of the President "He shall from time to time give information to the legislature, of the State of the Union, and recommend to their consideration the measure he may think necessary."

The provision appears to have aroused no criticism, and with the addition of the words "and expedient" went in substance into the Federal Constitution. Few more striking illustrations could be found of provisions with far-reaching consequences unforeseen at the time of their adoption. State after State copied the authority, seemingly without a thought of its interference with the doctrine of the separation of powers. For a long time both in States and nation the "information" feature predominated in the inaugural addresses or messages that resulted. They were mostly a rehearsal of facts, with finance taking the leading place—dull and dreary reading. This is now fast changing. Recent messages look to the future more than to the past. Executive programs for legislative action are the order of the day.

Presidents began by making speeches to Congress, both at the time of their inauguration and at the beginning of each annual session. Each House answered with a carefully prepared document, presented separately by a committee of each House to the President at his residence, the President responding briefly. Thomas Jefferson had no pleasure or facility in public speaking, and he escaped the task by sending to Congress a letter pointing out the inconvenience of making by personal address the first communications between the Executive and the Legislative. In begging leave instead to enclose a written message, he said he had principal regard to the convenience of the legislature, to the economy of their time, to their relief from the embarrassments of immediate answers on subjects not yet fully before them, and to the benefits thence resulting to public affairs. Succeeding Presidents sent their messages in writing until President Wilson returned to the original practice of addressing Congress in person. Commenting on this Mr. Taft said he thought the change was a good one. "Oral addresses fix the attention of the country on Congress more than written communications, and by fixing the attention of the country on Congress they fix the attention of Congress on the recommendations of the President."<sup>1</sup> Mr. Harding took the same course, but it did not become the general rule.

All the Secretaries respond without question when invited to appear before committees of Congress. Until lately, however, it has not been thought fitting for an American Executive to have

<sup>1</sup> *New York Times*, October 11, 1915

any open communication with a committee of the legislative branch By the diary of Edward Hooker we find John Taylor arguing very earnestly to the South Carolina Legislature in 1805 against the propriety of allowing the Governor to communicate information to a committee of the House, instead of laying it before the House at large. He thought such an allowance would be an undue approximation toward a union of the executive and legislative powers<sup>1</sup> When the Federal Senate deputed a committee to confer with Mr. Madison about the appointment of a Minister to Sweden, the President transmitted (July 6, 1813) a formal communication declining the conference, on the ground of the co-ordinate relation between the Executive and the Senate which the Constitution had established Nowadays, however, Presidents are not averse to dealing with committee members. The country was well informed of the meeting between Mr. Wilson and the members of the Senate Committee on Foreign Relations, at the White House, when the President discussed the negotiations leading up to the Treaty of Versailles He did not attend formal sessions of committees, but he had no hesitation in putting to use the President's room at the Capitol for conferences with Senators and Representatives regarding important positions he had at heart. With him all pretence of executive isolation disappeared

In this course Mr. Wilson but carried out the policy that had won him popular approval when as Governor of New Jersey he appeared before informal meetings of legislative committees

Perhaps emboldened by Mr. Wilson's example, other Governors have of late gone to lengths that would have been generally frowned upon before the new conception of executive responsibility blossomed Governor Dunne of Illinois told the Governors' Conference of 1914 that in his State the committees sent for the Governor, and he had on several occasions so appeared in response to their request<sup>2</sup> Governor Walsh of Massachusetts argued to the same Conference the wisdom of going before committees He had so appeared in one or two matters in which he was vitally interested, the first time it had been done in Massachusetts for thirty years, he said, almost the first time in the history of the State He had found that very few persons interest themselves in the recommendations of the Governor Men outside the Legislature seem to assume that the Governor's

<sup>1</sup> *Am. Hist. Assn. Ann. Report for 1896*, 1, 865

<sup>2</sup> *Proceedings*, 223



recommendations will be heeded, and that considerable thought and attention will be given to them by the Legislature. So there is a small attendance at the committee hearings and political opponents are likely to use this apparent lack of public interest as an argument against the measure. He had asked a committee member. "Isn't it the business of the Governor and the Legislature to advocate the measures which the people themselves have passed upon?" They are really, he thinks, "the spokesmen and advocates of the people who passed judgment upon these issues on election day."<sup>1</sup>

The trouble with this view is that save in the matter of referenda, the people do not pass judgment upon State issues on election day. A hundred considerations may be at work in the choice between candidates. Who shall say that any one predominated, that on any one a majority of the voters passed judgment?

A practical objection is that a Governor in appearing before a committee exposes himself to possible loss of prestige. At best it is not consonant with prevalent and useful notions of the dignity befitting a Chief Executive. Even if no weight were to be attached to this, yet it is hardly prudent to ignore the chance of partisan attack under circumstances altogether favoring the aggressor. If a prejudiced and ungenerous committee man of a political faith opposed to that of the Governor, chose to catechize him with the freedom commonly held to be quite proper, he could easily put the Governor in a most awkward and embarrassing situation. For this reason if the practice is to spread, it would be much better for the Governor to invite the Committee to the Executive Chamber, for there he could shape the colloquy to suit himself and in some measure protect himself.

#### BILL-DRAFTING

Discussion has of late arisen as to the desirability of having the President or Governor draft bills to accompany his recommendations. At the outset of Parliaments, such was the practice of the Crown in England, but it was so soon dropped that no useful precedent can therein be found. The matter came to the front in the first Congress when the directions to be given to the Treasury Department were under consideration. It was objected by several members that the proposed provision was un-

<sup>1</sup> *Proceedings*, 220

constitutional, on the ground that the House alone had the power to originate money bills, and that the enactment proposed would put the power also in the hands of the Secretary of the Treasury. A very long discussion ensued on what was meant by "originating a bill." Some contended that to draft a bill was to originate it, others, that no proposed measure was a "bill" until the House had passed it; while others again said that it was a bill whenever the House authorized it to be introduced. Finally it was determined that there was nothing incompatible with the Constitution in allowing the Secretary of the Treasury to report plans and prepare drafts of bills — a view that has ever since prevailed.

In at least one instance, however, it has been held that Congress may not ask him to do such work. In 1797 (February 2) Speaker Dayton ruled out of order a motion by Mr. Coit that the Secretary be directed to comprise into one the various laws relating to impost and tonnage. The reason given was that no bill could be introduced in a way different from that prescribed by the rule, viz. by appointing a committee. Thereupon the House got round the difficulty by amending so that the Secretary should prepare and report a "system" rather than a "bill." Of course this was a quibble, but it suggests the jealousy with which early Congressmen viewed their prerogatives as an independent branch of the government.

Abraham Lincoln said, in a speech at Pittsburg, while on his way to Washington, February 15, 1861. "As a rule, I think it better that Congress should originate as well as perfect its measures without external bias."<sup>1</sup> Yet he made at least two exceptions to the policy of not having Presidents submit bills. On the 6th of March, 1862, he recommended the passage of a resolve — "which shall be substantially as follows" — then reciting the form suggested. On the 14th of July of that year he submitted the draft of a bill for compensating any State that might abolish slavery within its limits, recommending the passage of it "substantially as presented." President Taft went beyond any of his predecessors in formulating the proposals he laid before Congress, and in a number of instances submitted bills carefully drawn. Some criticism inevitably followed, of the sort that meets every innovation, but it did not win sympathy.

Henry Jones Ford thought what he described as "the right

<sup>1</sup> H. J. Raymond, *Life and Public Services of Abraham Lincoln*, 139

and the duty" of the President to recommend measures to Congress had been annulled by the committee system. Writing in 1924 he said, "the President is not allowed to present specific measures to Congress, that function has been usurped by the committees."<sup>1</sup> Whether or not such was the real cause, of late it has not been at work. President Hoover, through the Departments, sent drafts of several important proposals to the Capitol, to be introduced by leaders, and President Roosevelt in the first session after his inauguration, not only did the same thing, but also gave his personal attention to the text of big measures, followed by private disapproval of changes by amendment that did not commend themselves to his judgment. This was just as effective as if done openly and formally. With the second session he began giving his party followers more leeway.

In the proceedings of the Governors' Conference of 1913, the topic had a prominent place. Governor Ernest Lister of Washington said that at the end of the first session of the Legislature after he took office, he found that a great many things he had recommended had not become law, and measures recommended by other elected officials had not become law. He concluded one reason to be the fact that he had not prepared a single bill covering a single idea he submitted in his message. He did not believe the members of the Legislature ought to be called upon to do the work of preparing such bills.<sup>2</sup> Governor William H. Mann of Virginia said he did not hesitate to prepare bills and let them be known as the Governor's bills, so that there should be no false pretense.<sup>3</sup>

In the following year Governor Frank W. Byrne of South Dakota read a paper urging the submission of a Governor's recommendations in bill form.<sup>4</sup> "To make such recommendations," said he, "is not a privilege or right, merely, but a solemn duty. It is not unreasonable to construe these words as meaning that he shall make his recommendations in the most direct and effective fashion, or, at least, in definite and explicit form, so that there may be no question as to his exact meaning, and in the interest of effective accomplishment, he should be willing to assume responsibility in the most effective way. Why should not the Governor, in matters he deems of great importance, or

<sup>1</sup> *Representative Government*, 242

<sup>2</sup> *Governors' Conference Proceedings of 1913*, 294

<sup>3</sup> *Ibid.*, 318

<sup>4</sup> *Governor's Conference Proceedings of 1914*

in support of a measure he believes the people desire to enact into law, and, perchance, because of the advocacy of which he was chosen executive of his State, accompany his recommendation with the draft of a bill, for which he is willing to assume responsibility, that there may be no misunderstanding or equivocation as to his exact meaning and no question as to where the responsibility of the success or failure of the measure should rest?" Governor Dunne of Illinois said that shortly after his inaugural message he prepared bills on every topic in it and handed them to his friends in the Senate and House.<sup>1</sup>

In the same year Governor Emmet O'Neal of Alabama wrote "Under the Constitution of nearly every State the Governor is a part of the lawmaking power and can recommend to the Legislature for its consideration such measures as he may deem expedient. Eminent authority has held that these recommendations can take the form of a bill, if the Governor should so elect. In revising our Constitutions it would be well to define this power more clearly, to authorize the Governor to present, if he saw proper, his recommendations in the form of bills, and to give these bills precedence in the consideration of the Legislature."<sup>2</sup>

It would be a somewhat captious critic who took exception to these views. What possible infringement of the prerogative of Legislatures could come from the practice? The bill merely embodies the recommendation, and strengthens it in none but a legitimate manner. It has, too, the positive gain of showing clearly and precisely what the Governor has in mind. Also it ensures a well-considered basis for legislative action, as the bill will doubtless have been drawn by the Attorney General, or at any rate have had his examination. The routine labors of the Legislature will have been thereby so much lessened — a distinct advantage. No rights will have been impaired. It seems a case of gain without loss.

More debatable is the proposal that measures framed and presented by the Governor shall have the right of precedence on the legislative calendar. Henry L. Stimson may or may not have been the first to suggest this, but his suggestion, made at a banquet of the Tippecanoe Club of Cleveland, Ohio, and referred to in "The Outlook" of February 11, 1911, is the earliest

<sup>1</sup> *Governors' Conference Proceedings of 1914*, 208

<sup>2</sup> "Distrust of State Legislatures," *North American Review*, May, 1914.

coming to my notice. He argued that the enlarged power of the Governor to initiate legislation would in great measure do away with any necessity for a popular initiative, and that if the Governor's power over legislation should prove to be too great, it could always be checked by the use of an optional popular referendum. In 1913 the Illinois House adopted a rule giving administration measures precedence over everything except appropriation bills, and Tuesdays were set apart for their special consideration in Committee of the Whole. The rule never worked and was not continued at the next session. Dodds thinks it did not have a fair trial, and that it failed because of the jealousy of executive power on the part of the members, because of the influence of precedent, on account of which the House could not adjust itself to the new arrangement, and because of a general disregard for all rules that was specially marked in a session under the direction of an inexperienced Speaker.<sup>1</sup>

Another proposal for the extension of executive power is that if the Legislature fails to enact a bill substantially as recommended by the Governor, he may submit it directly to the people. Either because of a reaction in public sentiment as to the Initiative and Referendum, or because the Great War and its results have turned popular interest into other channels, the proposal has slumbered of late, but doubtless it will presently be revived. Indication of this appeared in the Model State Constitution drafted for submission to the National Municipal League in November of 1920. This draft carried the proposal beyond the original suggestion, for it contemplated that any bill failing of passage, whether it had been recommended by the Governor or not, might be submitted to referendum upon his order if at least one third of all the members had been recorded as voting in favor upon the question of final passage. Balancing this concession to the executive branch, however, was suggested one of like nature to the Legislative, to the effect that any bill returned with objections by the Governor and upon reconsideration not approved by a two thirds vote of all members elected, might by majority vote be submitted to the electorate.

The 3d Article of the French Constitution of 1875 declared that "the President of the Republic shall have the initiative of laws concurrently with the members of the two Chambers." In practice his initiative is not independent and direct, but is

<sup>1</sup> *Procedure in State Legislatures*, 105

exercised by him in conjunction with one or more Ministers. A proposed bill must be countersigned by a Minister, and he appears in person in the Chamber to explain and defend. In Sweden if the King wishes to propose a bill, "he shall obtain the opinion of the Council of State and of the Supreme Court regarding the matter, and shall present his proposal, together with such opinions, to the Riksdag." Most of the Latin American countries permit the President or the Cabinet Ministers to take the initiative.

Switzerland has a unique system. There every bill must come from the Federal Council, the executive body, what we should call the Administration — or else pass through its hands. Either branch of the Swiss Congress can recommend to the Council that it prepare a bill for a specified purpose and present it for the consideration of the Congress, or the Council may prepare and present a bill on its own initiative. Either House may suggest amendment. If the Council does not accept a suggestion that is thereupon formally approved by both Houses, the Council is bound to carry out its provisions.

Prof. W. F. Willoughby went still farther in the same direction when as legal adviser to the Chinese government (October, 1914, to June, 1916), especially to give advice as to a permanent Constitution, he recommended a novel allotment of powers. Studying the reasons why in so many cases the first attempts to create popular assemblies have resulted in failure, he concluded it was because of not distinguishing between the function of a National Assembly as an organ of public opinion and that of legislation. Untrained persons are not equal to the function of legislation, and so he advised the Chinese to secure only that of expressing public opinion. Let the Chief Executive frame bills for all legislation of a general character. These the Assembly shall study, debate, amend, and return to the Executive with reports. The Executive is to accept such suggestions as he may deem wise and then is to promulgate the perfected drafts as law. The Assembly, as in Switzerland, may initiate a recommendation that the Executive submit a bill.<sup>1</sup>

<sup>1</sup> *The Government of Modern States*, 299.

## CHAPTER IX

### THE CABINET SYSTEM

THE story of the separation of powers in England is a story of flux. The Anglo-Saxon Kings did no lawmaking. The Norman Kings brought with them the theory that they were to make the laws, the theory of the delegation of power to the ruler that had been worked out by the Roman lawyers to justify their Emperors. In most of the ancient free States the person or body entrusted with executive authority prepared laws for the approval of the people. Under the Roman republic the initiative was exercised by the Senate. The Emperors took over the function, presently dispensing with anything more than formal ratification of their proposals, in the end becoming virtually autocrats. Such were the Norman Kings up to the time of the Edwards.

It was little more than accident that led to turning the initiative over to a lawmaking body. Parliament began a share in lawmaking by sending petitions to the King. This form of initiating carried with it the notion that the King should give no opinion of the petitions until they were presented to him. The notion continued when it became more convenient and safer to accompany the petition with the precise form of bill wanted, and so it was presently conceived that the first steps were to be taken by Parliament and without royal interference. In this there was at the outset no recognition of the rights of the people or of the Crown or of anybody else. There was no question of right at all. Under the Tudors and Stuarts the Commons had to struggle for their initiative. The Crown maintained, and the House denied, that the Commons were summoned merely to vote such sums as were asked of them, to formulate or approve legislation submitted to them, or to give opinions on matters of policy in which they were consulted. A standing protest against the Crown's contention survives in the practice, at the beginning of every session, of reading a bill for the first time before the King's speech is considered.

It cannot be said that there was genuine separation of powers

so long as the King in important degree shared with Parliament in contributing personal judgment for the enactment of laws, or enacted them on his own responsibility. By denying petitions he exercised a veto power, if he framed the bills based on them, he might exercise the amending power. Through many generations he was an independent lawmaker by the use first of ordinances and then of proclamations. The strength of Parliament, after growing for a century or two, waned under the Tudors, when legislation by royal fiat reached its apex. James I obstinately insisted on his right to make law; Charles I lost his head for that right, after the Commonwealth the claim to it was revived by Charles II. Then came its real decline, until under George III the Parliament definitely determined that proclamations creating law were illegal. To-day the Crown issues proclamations and orders-in-council appearing to sanction any departure from the laws of the land, only on occasions of public exigency. Parliament jealously investigates such proceedings, and when they are shown to have been illegal, acts of indemnity are passed, to exonerate all persons who have advised them or shared in them. Of a different class are the orders-in-council that often provide legislative details. They are indeed only quasi-legislative, more accurately to be called administrative, and as they spring directly or indirectly out of the enactments of Parliament, they can hardly be thought to attest any material initiative on the part of the Crown.

That share by the Executive in lawmaking which takes the form of personal interference with the Legislative, never gained much ground in England. Inasmuch as Parliament began as a money negotiation between two parties, it was natural to assume from the outset that one party, the King, should not acquaint himself with what went on in the conferences of the other, the members or agents of the Estates. The principle was expressly admitted by Henry IV (1407), but the Tudors and Stuarts were not monarchs so punctilious as to mind only their own affairs, and Parliament had frequent occasion to resent royal meddling. Remonstrating in December of 1641, the Lords and Commons clearly set it forth as "their ancient and undoubted right that your Majesty ought not to take notice of any matter in agitation and debate, in either of the houses of Parliament, but by their information or agreement."

In the same remonstrance it was declared that "your Majesty



ought not to conceive displeasure against any man for such opinions and propositions as shall be in such debate, it belonging to the several Houses of Parliament respectively to judge and determine such errors and offences, which, in words or actions, shall be committed by any of their members, in the handling or debating any matters there pending." This was no new grievance. Said Peter Wentworth in the House of Commons in 1575, when Elizabeth was Queen. "Two things do great hurt in this place: the one is a rumour that the Queen's Majesty liketh not such a matter, whosoever prefereth it she will be offended with him; or the contrary. The other is a message sometimes brought into the House, either of commanding or inhibiting, very injurious to the freedom of speech and consultation."

It was two hundred years after Elizabeth brought this criticism on herself, before the practice became intolerable to Englishmen. George III in the course of the American War tried to influence votes in Parliament by expressing his personal resentment against all who did not support his measures, and by dismissing several members holding offices under the Crown. Military members were dismissed from their command of regiments, peers from their lord-lieutenancies. Loud was the complaint in Parliament, and the policy was at last abandoned by the King. However, as late as 1879 somebody deemed it necessary to urge in the House of Commons that it was "a true and sound constitutional principle that the Crown should know only of the collective action of Parliament — that it should know nothing of the action of individual members of that House to guide it in the distribution of favours." Gladstone pointed out the absurdity of the position. "I can conceive," he said, "that this House might object to the communication of the details of its procedure to the Crown, at a period when it objected to the communication of the details of its procedure to the nation." But with these details now made known by the press to everybody, from the Sovereign to her subjects, "I must decline to enter upon these high constitutional matters on the present occasion."

The remonstrance of 1641 touched on still another abuse by the Crown. The Lords and Commons said "Your Majesty ought not to propound any condition, provision, or limitation, to any bill or act in debate or preparation in either House of Parliament, or to manifest or declare your consent or dissent,

approbation or dislike, of the same, before it be presented to your Majesty in due course of Parliament." Nevertheless, Charles II opened several Parliaments by declaring that he would grant all reasonable demands, but that they must not touch the hereditary succession (that is, exclude his brother James), and the Tories told the Whigs that all their attempts to exclude James were useless, since the King would never concur, whereupon the Whigs answered that Kings had often yielded, and that at any rate the Houses must do what they considered their duty, and leave it to others to do theirs. "They justly observed that constitutionally no person can know the King's mind or be charged to declare it upon a subject which has not yet been brought constitutionally before him; that, therefore, all these declarations of his intended veto are but surmises or suspicions, not sufficient to be made by the Houses the foundations of actions of the highest magnitude" <sup>1</sup>

This precluded formal expression of the royal intent, but may have been thought not to extend to informal intimations of purpose. At any rate these did not cease, and they brought censure to George III, dealt to him through Earl Temple. In the House of Lords Temple announced that the King would consider everyone his enemy who should vote for the East India Company bill brought in by the coalition ministry. Immediately the House of Commons resented this interference of the executive with the legislative part of the Government, and passed this spirited resolution, December 17, 1783: "To report any opinion or pretended opinion of his Majesty upon any bill or other proceeding depending in either House of Parliament with a view to influence the votes of the members is a high crime and misdemeanor, derogatory to the honor of the Crown, a breach of the fundamental privileges of Parliament, and subversive of the constitution." Temple, however, paid no penalty for his high crime and misdemeanor, save that the clamor against the use of the King's name in the affair forced him to give back the seals he had received three days before. De Lolme, writing in this period, said the Commons had settled it as a rule, "not only that the King could not send to them any express proposal about laws, or other subjects, but even that his name should never be mentioned in their deliberations. If any person should mention in his speech, what the King wishes

<sup>1</sup> Francis Lieber, *Manual of Political Ethics*, 2d ed., II, 387.

should be, would be glad to see, &c. he would be immediately called to order, for attempting to influence the debate."<sup>1</sup>

When Jefferson came to compile his manual for guidance in presiding over the United States Senate, he elaborated this point, quoting from the English authority that was his chief resource. "It is highly expedient, says Hatsell, for the due preservation of the privileges of the separate branches of the legislature, that neither should encroach on the other, or interfere in any matter depending before them, so as to preclude, or even influence that freedom of debate, which is essential to a free council. They are therefore not to take notice of any bills or other matters depending, or of votes that have been given, or of speeches which have been held, by the members of either of the other branches of the legislature, until the same have been communicated to them in the usual parliamentary manner. Thus, the King's taking notice of the bill for suppressing soldiers, depending before the House, his proposing a provisional bill before it was presented to him by the two Houses, his expressing displeasure against some persons for matters moved in Parliament during the debate and preparation of a bill were breaches of privilege."<sup>2</sup> And he went on to cite the Temple episode. So the principle came to be embodied in parliamentary law.

From all this it appears that the executive share in lawmaking, waning somewhat in the first century or two of Parliaments, then rising to a high point under the Tudors, gradually sank through two centuries or more until it reached a low point under George III. Then it began rising again, but in a new form, not that of the titular monarch. Executive power was passing from the King to the head of a committee of the majority in the House of Commons, known as the Cabinet or the Ministry. At the time this was not realized. Writers of that day thought only of the King when they spoke of the Executive. For example De Lolme, who published the first edition of his book in 1771, said, "This privilege of starting new subjects of deliberation, and: in short, of *propounding* in the business of legislation, which, in England, is allotted to the representatives of the people, forms another capital difference between the English Constitution and the government of other free states, whether limited monarchies or commonwealths, and prevents that which, in these

<sup>1</sup> *The Constitution of England* bk II, ch 8

<sup>2</sup> *Jefferson's Manual*, sec. III. Also 2 *Hatsell*, 251, 252.

states, proves a most effectual means of subverting the laws favorable to public liberty — namely, the undermining of these laws by the precedents and artful practices of those who are invested with the executive power in the government ” <sup>1</sup>

And again: “Among the many circumstances in the English government which would appear entirely new to the politicians of antiquity, that of seeing the person entrusted with the executive power bear that share in legislation which they looked upon as being necessarily the lot of the people, and the people enjoy that which they thought the indispensable office of the magistrates, would not certainly be the least occasion of their surprise.”

And further: “The English Parliament . have not only secured to themselves a right of proposing laws and remedies, but they have also prevailed on the executive power to renounce all claim to do the same. It is even a constant rule that neither the King nor his Privy Council can make any amendments in the bills preferred by the two Houses; but the King is merely to accept or reject them, a provision this, which, if we pay a little attention to the subject, we shall find to have been also necessary for completely securing the freedom and regularity of the parliamentary deliberations ” <sup>2</sup>

Blackstone was equally blind to what was happening. Is it surprising, then, that the statesmen who wrote the Constitutions of our Revolutionary period had no inkling of the change? They had no reason to suppose that Montesquieu was inaccurate in his conclusions about the government of England. Indeed these were not greatly inaccurate in the matter of conditions prevailing during most of the twenty years in which he was preparing his book. The degree of separation of powers he extolled was that which existed while our American institutions were in the formative stage of colonial times. We have adhered to the English system of the seventeenth century and the first part of the eighteenth, while England has been gradually departing from it until now almost no vestige of it there remains.

#### MINISTRY AND MINISTERS

Names often inform us about origins. The Cabinet or Ministry, as the words suggest, was originally a group of administra-

<sup>1</sup> *The Constitution of England*, bk II, ch. 18 (ed. of 1784).

<sup>2</sup> *Ibid.*, bk II, ch. 4.

tive officials small enough for the privacy of a little room. Although some have traced it back as far as Henry III, its origin is commonly ascribed to the group selected from the Privy Council as advisers by Charles II and nicknamed the "cabal" — a word made up of the initials of its members. Such a group first attained something of present-day significance under William of Orange. The share of Parliament in putting that monarch on the throne naturally led to its becoming the supreme power in the State. The King's ministers began to look to it for direction and support. Furthermore, as William failed to govern successfully with a Ministry made up from both of the divisions into which the people had recently divided themselves, Whigs and Tories, the first real political parties as we now understand the term, he chose a body of advisers all Whigs and thus gave definite form to the idea of control by leaders of one party.

No precise date can be given for the birth of the Cabinet, but probably more can be said for 1696 than any other. Three years before that the principal offices of the Government were about equally divided between the two great parties. After the Whigs carried the general election of 1695, they took all the chief executive offices, and their committee of the Privy Council that was soon to be known as the Cabinet, with a party majority behind them in the House, began controlling affairs. Queen Anne, who held a Cabinet meeting every Sunday, was, with the doubtful exception of one meeting, the last monarch to attend. Very likely George I stayed away because he could not speak English. That inability undoubtedly helped the Cabinet to grow in power.

What is known as ministerial responsibility probably began its rise under Queen Anne. According to May's definition,<sup>1</sup> ministerial responsibility was reached when the government of the State came to be conducted, throughout all its departments, by Ministers responsible to Parliament for every act of their administration — without whose advice no act could be done — who could be dismissed for incapacity or failure, and impeached for political crimes — and who resigned when their advice was disregarded by the Crown, or their policy disapproved by Parliament. This was not all achieved in Anne's time, but in 1711 we find the Earl of Rochester saying that

<sup>1</sup> T. E. May, *Const. Hist. of England*, I, 19.

"according to the fundamental constitutions of this kingdom the Ministers are accountable for all " The change is shown more clearly by a speech of the Duke of Argyle in 1739. "The nature of our Constitution requires that public acts should be issued out in his Majesty's name, but for all that, my lords, he is not the author of them."

With Walpole came the notion that the Ministry should have a head, in effect a Prime Minister, though for long after his time, the men holding that position disclaimed such a title. The notion was of no man's devising, but the result of one man's personality. Walpole, who virtually governed England for twenty-one years, towered so far above his fellows that he made the idea of leadership normal. When, in 1741, the Peers moved an address to the Crown for his removal, the principal charge brought against him was that he had made himself sole Minister. The motion was defeated, but an entry in the Journal of the House of Lords shows recognition of the fact that a new political institution had been born, an institution distasteful to the conservatives, like all political novelties. "A sole or even a first Minister," it was declared, "is an office unknown to the law of Britain, inconsistent with the Constitution of the country, and destructive of liberty in any government whatsoever", and "it plainly appearing to us that Sir Robert Walpole has for many years acted as such by taking upon him the chief if not the sole direction of affairs in the different branches of the administration, we could not but esteem it an indispensable duty to offer our most humble advice to his Majesty for the removal of a Minister so dangerous to the King, and to the kingdom." Sandys, who led the attack in the Commons, took like ground. "According to our Constitution we can have no sole and Prime Minister. We ought always to have several Prime Ministers and officers of state. Every such officer has his own proper department, and no officer ought to meddle in the affairs belonging to the department of another."

Also with Walpole came the first instance in which the fate of a Ministry depended on the result of an election. His unpopularity was at its height when in 1741 the period for a dissolution of Parliament arrived. A bitterly contested election left him with but a bare majority, and after eight weeks of wrangling, he was defeated on an election petition and thereupon resigned.

It is not easy to say with precision just when it became agreed that the monarch might not appoint nor retain what Ministers he pleased. Anne was forced to name some she did not like and dispense with others she did like, but it can hardly be said the principle was established before the time of George II. In 1745 the Pelhams in office proposed to give William Pitt a place in the administration, but the King refused his consent, whereupon the whole Pelham connection resigned together, the first instance of general resignation. The King sent for Carteret and Pulteney, but they could not get support enough for a Ministry and had to return the seals. In the end the King had to reinstate the Pelhams. "Here, I take it," says Sir J. R. Seeley, "begins the decline of the Monarchy in England, for I imagine that no English King had been so treated before."<sup>1</sup>

The compelling force in this case was not Parliament, but the people outside Parliament, and so the King said to Pitt: "You, sir, have taught me to look for the sense of my people elsewhere than in Parliament." George III did not take kindly to this idea, resisted it, and was on the whole successful. Yet it was in his time that ministerial responsibility, which had meant only legal responsibility, definitely became political as well. It is believed that Fox was the first Minister to admit this. The younger Pitt entered the office of First Lord of the Treasury and Chancellor of the Exchequer in 1783, with an overwhelming majority against him. He fought Fox until that majority had dwindled to one. Then came dissolution, and an election in which 160 of those members who had defeated him in the Commons, were unseated. Thus was established the principle of an appeal to the people, on the result of which the Ministry should depend — in other words, the establishing of the principle that the people are the source of the authority of the Executive.

When our Federal Constitution was adopted, then, it had come to be accepted in England that a Cabinet should ordinarily be composed of members of the same political party, should be of the party controlling a majority in the House of Commons; should resign when no longer supported by a majority, should look to the people for ultimate authority, should be responsible for all the acts of government, and should have a commanding head, the Prime Minister. Furthermore the men composing a

<sup>1</sup> *Introduction to Political Science*, 281

Cabinet should be members of Parliament, for a century and more of measures directly or indirectly standing in the way of this, had proved ineffective against the irresistible course of development. It is noteworthy that not one of these things commended itself to the framers of our Constitutions. Perhaps it was too early for their significance to be realized. Perhaps they were deliberately adjudged undesirable, though there is no proof of this. The certain thing is that there was no attempt to copy.

The stubborn resistance of George III to the new order was not continued by his successors. Under George IV and William IV the Crown lost and the Commons gained rapidly. Seeley thinks the share of William in the appointment of Earl Grey, compared to the share of the people, was as one to a hundred.<sup>1</sup> The decisive step came just after the Reform Bill of 1832, and if not a consequence of that measure, was at any rate a manifestation of the spirit from which it sprang. In 1834 the King tried to assert his personal wishes with regard to the choice of his Ministry by suddenly dismissing Lord Melbourne's Government, and calling Sir Robert Peel to power, though it was known that Peel could rely on only a small minority in Parliament. The General Election showed that the country refused to ratify this high-handed act, and after a struggle against a hostile majority, Peel was obliged to resign. Thus with William IV the long chapter of personal government came to a close. The King had lost the power of appointing his Minister.

It is now understood that the function of the Sovereign is merely to interpret the will of the majority of the House of Commons in the choice of a Prime Minister. In practice it proves that almost invariably the choice is clear. No occasion is found for caucus or ballot as would be the natural course in the United States. Rarely has the King opportunity to hesitate between even two names, and if that opportunity arises, he is not supposed to indulge personal preference.

Of course all the implications of the position reached at the time of the Reform Bill, were not at once recognized. As late as 1841 Macaulay maintained in the House of Commons, speaking as a Cabinet Minister, that the Government were not bound to resign because they could not effect legislative changes, except in particular cases where they were convinced that with-

<sup>1</sup> *Introduction to Political Science*, 284.



out such and such a law they could not have carried on the public service. In the century beginning with 1832 only ten Ministries that could normally command a majority in the House of Commons resigned because of defeat. The need was much more questioned in the last part of that century than in the first. Since 1886 there has been but one dissolution by reason of withdrawal of confidence on the part of the House. When in 1919 the Alien Restrictions Bill was returned from a committee with several changes made in the face of ministerial opposition and the Government at the report stage demanded rejection, it was defeated by 185 to 113, but though the Cabinet was seriously shaken, it made no offer to resign.

It seems to be accepted now that Ministries need not resign by reason of defeat on minor matters or by reason of votes having no genuine significance. On a snap division April 10, 1923, with many Conservatives away, the Government was defeated by seven votes. It refused to resign and soon after obtained a majority of 107. In the following year, when Ramsay MacDonald took office, in the course of his speech February 12 defining the policies of the new Labor Ministry he said "I have a lively recollection of all sorts of ingenuities practiced by oppositions in order to bring a snap division upon the Government so that it might be turned out on a defeat. I have known bath rooms down stairs utilized, not for legitimate purposes, but for the illegitimate purpose of packing as many members surreptitiously inside their doors as their physical limitations would allow. I have known an adjoining building where there happens to be a convenient division bell, used for similar purposes. I have seen this House practically empty when the bells began to ring and then turned into a riotous sort of market place by the inrush of members for the purpose of finding the Government napping and turning it out upon a stupid issue. I am not going out upon any such issue. The Labor Government will go out if it is defeated upon substantial issues — issues of principles, issues that really matter. It will go out if responsible leaders of either party or of any party will move and carry a direct vote of no confidence." In the course of the next six months MacDonald was defeated ten times but he kept his word till Parliament adjourned August 4. Upon reconvening, the Government declared it would accept an expression of lack of confidence. After MacDonald came back into power, when

defeated March 11, 1931, by eight votes on a minor matter, he again did not resign

Nowadays a member of the majority party in the House will hesitate long before voting against his party leaders. He has no desire to turn out his own party, and so bring in the Opposition, perhaps thereby losing his seat and the salary attaching thereto; nor does he wish to incur the expense and undergo the labor of an election. Also at stake are the interests of the twenty-two members of the Cabinet, with thirty or more other party officials dependent for status and salary on the continued existence of the Ministry. They have strong motive to exert all the influence they can to stave off dissolution.

Furthermore, the strengthening of party discipline in recent years has made it more and more dangerous to break away from party leadership. Harold Cox, explaining "The Decay of Parliament," says that with the extension of the franchise it became necessary to organize the party system on more rigid lines, because without the party machinery it was practically impossible for an individual candidate to get through the work necessary to induce people to vote for him in any large constituency. Thus, the candidate, being dependent upon the party machine, was bound, if elected, to obey orders received from that machine.<sup>1</sup>

The first of all reforms, Mr. Cox thinks, is to get rid of the constitutional rule that the Crown must dissolve the Parliament on the advice of the Prime Minister. Sir David Brynmor Jones, before the Select Committee on House of Commons Procedure in 1914, took the same view. As long as that power is left to Ministers, there will be a certain number of members who will be liable to support the Ministry for fear of a dissolution, and this he believed pernicious. Other thoughtful Englishmen are of like opinion. They would prefer a statutory term as in the United States. It is interesting to observe that while American theorists see in the British practice a desirable method of quickly reflecting change in public opinion, in England the urge is to substitute American practice in order to produce precisely the opposite result. There the wish is to protect the House from the mob prejudices that occasionally sweep the country.

Distant hills are always greenest.

<sup>1</sup> *The English Review*, January, 1929

Of the ten dissolutions since 1895 seven were for appeal to the country to get a mandate in dealing with some special matter, despite the fact that the Government still had a majority and had not suffered decisive defeat. Four of the seven were as a plea for renewed confidence from the electorate in the course of national crises. Other reasons in the last hundred years have been: demise of the Crown, approach to the end of the legal term; dispute between the two Houses, party strategy, appeal to the country by a minority party on taking office, loss at by-elections<sup>1</sup>

The most important feature of the development of the Cabinet has been the assumption of lawmaking by the Executive. This was in considerable measure accomplished within a generation. Sir Charles Wood, talking to Mr Nassau Senior, about 1855, is reported to have said: "When I was first in Parliament, twenty-seven years ago, the functions of the Government were chiefly executive. Changes in our laws were proposed by independent members, and carried, not as party questions, by their combined actions on both sides. Now, when an independent member brings forward a subject it is not to propose himself a measure, but to call it to the attention of the Government"<sup>2</sup>

It will be seen that this did not go the whole distance. The House was still suggesting to the Executive Committee of its majority what it wanted done, so that at least some power of initiation yet remained in the great body of members. Thirty years later it had become the practice to determine on all the important legislation before Parliament even assembled. Sir Henry Maine then wrote: "It is in the Cabinet that the effective work of legislation begins. The Ministers assemble in Cabinet in November, and in the course of a series of meetings, extending over rather more than a fortnight, determine what legislative proposals are to be submitted to Parliament"<sup>3</sup>. Still three decades later the process had been completed and J. A. R. Marriott could say: "It is notorious that the right of initiation has now been virtually monopolised by the Ministers of the Crown"<sup>4</sup>

In this development there has been no pre-conceived, de-

<sup>1</sup> Chi Kao Wang, *Dissolution of the British Parliament, 1832-1931*, 103, 105.

<sup>2</sup> Mrs Simpson, *Many Memories of Many People*, 223

<sup>3</sup> *Popular Government* (1885), 237

<sup>4</sup> "The Constitution in Suspense," *Nineteenth Century*, January, 1914

liberate purpose. It has come about through the necessities of the case, chiefly because of the growth of business and the lack of time to handle the work. This has compelled a program based on the imperative need that the Government proposals shall have the right of way. Each regular session (as it would be called in the United States) is divided into three parts by Easter and Whitsuntide. In the first part private members have two evenings a week available for motions, in the second part, one evening, in the third part, none. For bills they have Fridays in the first and second part, but, with two exceptions, not in the third part. The result is that unless the bill of a private member is so simple and unimportant that it slips through without notice, his only chance of even getting it read a second time depends on the good fortune of the lottery that will give him an early place on some Friday, and unless it be a Friday early in the session, his case is practically hopeless. Difficulty was increased by the adoption of the rule under which the House ordinarily rises at midnight, meant to end the demoralizing scandal of all-night sittings. The incidental effect was to put it within the power of a very small hostile minority to talk out the motion of a private member. "Thus, even if he gets a place on the order-paper before Easter, the private member has very little scope, and at the best he can hardly expect to do more than call attention to his proposals, in the hope that they may impress public opinion, and in time be inscribed on a ministerial program. After Easter he can do very little indeed, and after Whitsuntide nothing at all."<sup>1</sup>

In a resolution moved by the Premier July 31, 1908, Edward Porritt saw the culmination of a development covering less than thirty years, which to his mind was well-nigh as significant and far-reaching as that which took place in the sixty years following the Revolution of 1688, the period of the evolution of the system of Government by Cabinet. On the eve of adjournment for the recess Mr. Asquith's motion, carried without division, determined that in the autumn session, from October 12 until the close, only Government business should come before the House. In these weeks private members were to have positively no opportunities for advancing bills of which they were in charge, that had passed their earlier stages before the recess. Less than thirty years earlier, says Porritt, Mr. Asquith or any

<sup>1</sup> Sidney Low, *The Governance of England*, 71

other leader of the Government in the House of Commons could not have proposed such a motion. In the curtailment of rights of private members and in the control of the time of the House secured to the Government by rules determining the exact time to be set apart for discussion in committee of supply, by rules giving the right of way to Government business, and by closure rules, Mr. Porritt found a change in the working of the British Constitution that amounted almost to a Revolution.<sup>1</sup> If the phrase seem somewhat extravagant, let it be recalled that Sir H. S. Maine, publishing his book on "Popular Government" in 1885, and having fresh in mind the remedies devised against Parnell's tactics of obstruction, predicted (p. 95) that these remedies would prove to be merely palliatives, declared that no multitudinous assembly can be free from Obstruction, and thought it would probably lead to "a constitutional revolution," the House of Commons abandoning the greatest part of its legislative authority to a Cabinet of Executive Ministers.

Side by side with the lessening of the private member's power to start anything, has gone the lessening of his power to change anything. In the time of Palmerston, it was no unusual thing for the House of Commons to insist upon its amendments to Government bills, despite the opposition of the Treasury Bench. This was held not to imply a want of confidence in the Cabinet. In 1851 nine such amendments were carried against the Government, in 1854, seven, in 1856, again seven. Not a single amendment was thus carried from 1874 to 1878, nor in 1889 or 1890, nor from 1897 to 1900, and in the decade from 1897 to 1906 there were only four such amendments.

These figures, however, are not conclusive. Discussion of amendments may reveal defects of which the Government was not aware, or disclose hostility to some detail in a degree not expected. Amendment may then be accepted or a clause written to meet the criticism. If the decrease in the number of amendments carried against the will of the Government is thus in part to be explained, yet it appears evident that the Government has been gaining in power to prevent changes it does not approve.

Discussion has been steadily lessening in importance. Time was when a session of Parliament consisted of a series of debates at which Ministers gave the benefit of their official knowledge.

<sup>1</sup> Edward Porritt, *North American Review*, February, 1909

By 1891, when Sir J. R. Seeley delivered the lectures embodied in his "Introduction to Political Science," a session had become "a series of conferences between the executive government and the representatives of the people" About the same time Freeman Snow observed that only a few score of the members of Parliament ever formulated their own opinions, or felt a personal responsibility for the action of that body "More than four-fifths of the members do not even take the trouble to attend the sittings of Parliament, except when they are summoned by the party whips to come in and be counted when a vote is taken It is related of one of the rank and file of a party that he once said 'he had made it an invariable rule never to be present at a debate, nor absent on a division, and only once in the course of a long parliamentary life did he venture to vote according to his conscience, and on that occasion he voted wrong.'" <sup>1</sup>

Sidney Low says that in the session of 1893, a measure of the largest scope bristling with controversial detail, on which it was inconceivable that all those who constituted the majority—to say nothing of the Opposition—could have been absolutely eye to eye, was voted through at the call of the Cabinet, with more than two thirds of its clauses not so much as discussed in Committee <sup>2</sup>

Surely in 1894 nobody in England could speak on parliamentary procedure with more authority than Lord Salisbury Said he in a speech at Edinburgh. "We have reached the point where discussion is possible in the Cabinet, but for any effective or useful purpose it is rapidly becoming an impossibility in the House of Commons"

Of so little consequence became the opinions of private members that the Ministers stopped bothering to come and hear them, save for the one Minister directly concerned. T P O'Connor said in 1900 that during the nights, for instance, when the Chancellor of the Exchequer was dealing with the Budget in Committee, the Chancellor sat on the treasury bench all alone. Not even the Secretary of the Treasury was there to keep him in countenance, or even to help him with some of the facts of the department to which they both belong And, similarly,

<sup>1</sup> "A Defense of Congressional Government," *Papers of the Am Hist Assn*, iv, 118 (1890)

<sup>2</sup> *The Governance of England*, 72

when the Telephone Bill was being carried through the House of Commons, Mr Hanbury, the Secretary of the Treasury, was left all to himself, the Chancellor of the Exchequer rarely, if ever, put in an appearance. "Solidarity, in the sense of a body of men ready and present to help each other in debate, no longer exists in the House of Commons" <sup>1</sup>

After the Great War began, the Ministry got to the point of ignoring parliamentary debate altogether when to ignore suited fancy Sidney Low in the "North American Review" for June, 1916, described an exciting debate at which not one of the twenty-two Cabinet Ministers was in his place, the sole occupants of the Ministerial Bench being two or three under-secretaries. Their chiefs had gone off to dinner in a body, "not apparently thinking it worth while to waste time over the proceedings." Autocracy had reached indifference. It is the age-long lesson of history that in time of war nations instinctively turn toward dictators, and the manifestations of dictatorship in England during this period were to have been expected, so that too much significance must not be attached to them, but it happens they were the next logical step in a progress long under way.

Up to the time of the World War the Cabinet had absolutely no organization. There was no statute from which it derived its powers. It had no secretary, no seal, no permanent location, no means of writing a letter or receiving one in its official capacity. War needs brought the creation of a secretariat. Now minutes are made and preserved, but there is no record of individual opinions. The secretariat prepares agenda, provides material, and draws up records for communication to Departments <sup>2</sup>

Gladstone had occasion to reprimand a Minister who in a public speech had referred to what had taken place in the Cabinet of which he was a member. After calling attention to the fact that the Cabinet is the operative part of the Privy Council and that the Privy Councillor's oath is applicable to its proceedings, he said, "No one is entitled even to make a note of the proceedings, except the Prime Minister, who has to report its proceedings on every occasion of its meeting, to the Queen,

<sup>1</sup> "Some Absurdities of the House of Commons," *North American Review*, August, 1900

<sup>2</sup> *American Political Science Review*, May, 1928, p. 390

and who must by a few scraps assist his memory " <sup>1</sup> Of course this is wholly contrary to the notion now particularly prevalent with us, that everything governmental should be public. Secrecy, however, is not of the essence of a Cabinet system, though undoubtedly conducing to its efficacy as in the case of any autocratic method

In summary it may be said that to-day the English Cabinet is the Chief Executive of the nation, that it is the central administrative board, that its most important duty is legislation; that of its own initiative and upon its own responsibility it makes the laws, modified only as the criticisms of Parliament may be accepted, and subject to veto only if it loses its majority in the House of Commons, that it shapes the program and directs the procedure of Parliament, that save for the opportunity to criticize or to vote in opposition the member of Parliament not in the Cabinet is a negligible factor; and that inasmuch as the Prime Minister necessarily dominates the Cabinet, he is in effect an autocrat, controlled by an unformulated Constitution which obliges him to act within the law, and having duration of power contingent upon the popular will.

#### FUSION OF FUNCTIONS

Reviewing the story of Cabinet development and the description of Cabinet Government as it exists to-day, can the reader still question that Bagehot was right in describing what he called "the efficient secret of the English Constitution," as the close union, the nearly complete fusion, of the executive and legislative powers? "No doubt by the traditional theory, as it exists in all the books," he said, "the goodness of our Constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation " <sup>2</sup>

With this in mind, observe the following assertion, made by the Bureau of Municipal Research in its monograph prepared for the instruction and guidance of the delegates to a New York State Convention "It has been shown by all the experience of representative government that in those institutions in which the Executive is required to meet with the representative body and submit his proposals and defend them, the principle of the

<sup>1</sup> John Morley, *Life of W. E. Gladstone*, III, 114

<sup>2</sup> *The English Constitution*, 76



separation of the powers has been preserved" <sup>1</sup> When professional scholars, experts retained to inform the people, specialists of high standing, make statements so widely at variance from the fact, shall one be surprised if the people or their representative assemblies sometimes go astray?

Understanding, then, that in England the chief powers are in effect amalgamated, let us turn to English authorities for judgments of the results

Henry Sidgwick has pointed out the serious drawbacks with which the Cabinet system buys harmony <sup>2</sup> In the first place, he says, the advantages of division of governmental labor tend to be lost in the fusion or confusion of legislative and executive functions. Ministers are liable to be distracted from the executive duties by the work of preparing legislative measures and carrying them through Parliament, while Parliament is tempted away from legislative problems by interesting questions of current administration, in which, especially in foreign affairs, it is liable to interfere to an excessive extent. To maintain harmony between the two organs, the Executive is continually led to adopt not what it considers on the whole the best course, but the course which it regards as most easily defensible in the face of parliamentary criticism, or least likely to provoke it. Furthermore, the Executive is liable to be upset at any moment by a breeze of popular disfavor, unless the representative chamber is not in harmony with the popular movement. It is also liable to be upset by intrigues and new combinations of parties in the chamber, if the intriguers are skillful in choosing their opportunity, so that their newly-formed majority is not upset on an appeal to the country. Thus, apart from the continual interference of Parliament with executive business, the mere uncertainty of tenure of the Chief Executive tends to render very difficult the adoption of a far-sighted and consistent policy.

Such effects of partisanship have become more serious in the course of the years since Sidgwick wrote, for within that period the party system has become much better organized, and Ministers are more and more expected to be party leaders. A V. Dicey has more recently contrasted the English and American situations in this regard. <sup>3</sup> He thinks that although Presidents

<sup>1</sup> *The Constitution and Government of the State of New York*, 75 (May, 1915).

<sup>2</sup> *The Elements of Politics*, 423, 424

<sup>3</sup> *Nineteenth Century*, January, 1919

are elected by parties, the dignity of their office limits the evils of partisanship. A President continues when in office to a much less extent than a Prime Minister continues, to be the head of a party. A President when he has taken office is always recognized as being the representative of a nation. A Prime Minister, however pure his patriotism, can hardly be other than the leader of a party. It is the independence of the President which more than once has raised him from a partisan into a leader of a nation. It is the dependence of the Cabinet upon the will of the House of Commons, or even nowadays on the will of party organizations, which has sunk many a patriotic Minister into the leader or the servant of the party.

Not all Americans would admit that Mr. Dickey fully understood the relations of Mr. Wilson to his party at the time when this comparison was made. Furthermore the supposition that the man elected President has previously been the head of a party is quite unwarranted. He is generally regarded as becoming the head of his party by virtue of his election, but he may or may not have been a recognized party leader, and after election he may or may not in fact dominate. Often strong men in the Senate, more rarely in the House, have as much as the President to do with shaping party policies. Unquestionably, however, the partisanship of Congress concerns and controls the President much less than that of Parliament the Prime Minister.

From the administrative point of view the effect of the Cabinet system is not so happy as various American admirers have supposed. Again turning to Sidgwick, we find him showing that by reason of the conditions under which Cabinet appointments must be made, the heads of departments are liable to be persons who are not really qualified for managing, and if well-advised do not attempt to manage the business of their departments. "And thus it may be said that English constitutional monarchy results not only in one sham, but a complex system of shams: we have not only a ruler who merely pretends to rule, but also Ministers who merely pretend to administer."

There are, however, weighty considerations on the other side, which have been forcibly urged by Bagehot in his book on "The English Constitution." He maintains, in the first place, that special experience is not so important as the critics of parliamentary Ministers imply, most businesses being more like each

other in their upper posts than in their lower. Secondly, he urges that the special function of the parliamentary head of a department, which a permanent head could not so well perform, is to save the office from the deadly disease of routine, to act as a channel by which the useful part of outside complaints and criticisms may be forced on the attention of the officials who are too apt to despise them as uninstructed clamor, while, thirdly, he points out that so far as outside clamor is misdirected, the parliamentary head from his influence over the legislature is able to prevent unwise legislative interference with the department, on occasions on which a permanent head — even if allowed a seat in the legislature or a right of addressing it — would be practically powerless. Thus the parliamentary Minister, even granting that he does not really administer his department, is not to be regarded as a mere puppet. he is at once a channel for useful influence, and a buffer against mischievous influence.

Sidgwick admits that these arguments of Bagehot are forceful and important, but says it remains difficult to believe that any business can be under the best attainable management when the chief who has the whole responsibility of action lacks the knowledge and experience requisite for wise independent decisions. He thinks, therefore, that we have here a defect of the actual system of Parliamentary government, against which a remedy is needed, if governmental administration is to reach a high pitch of excellence.

The autocratic development of the Cabinet system that has marked recent years in England seems to me the phenomenon that should be most seriously pondered. If the testimony of various Englishmen of standing is to be accepted at its face value, the results are ominous. Note, for instance, what Lord Hugh Cecil said in the House of Commons in March, 1901. "Why is it that nobody cares outside these walls, about the rights of private members? Because there is a deep-seated feeling that the House is an institution which has ceased to have much authority or much repute, and that when a better institution, the Cabinet, encroaches upon the rights of a worse one, it is a matter of small concern to the country."

Sidney Low says, "every member of the House, with the exception of a score or so, who sit on the front benches to the right of the Speaker's chair, would admit, if he spoke the truth, that his influence over legislation was little greater than that of a

private individual outside " <sup>1</sup> Low quotes from Bernard Holland. "It is felt already that, for a man who desires not so much honorary distinction as real and practical work, the London County Council offers satisfactions which Parliament is powerless to bestow " To the Select Committee on House of Commons Procedure in 1914 Herbert Asquith said "I think the position of a private member in these days, say during the lifetime of the last three Parliaments, the private member who is a supporter of the Government, and who is one of a more or less large majority, whose duty as a good party man is to be always there, and to hold his tongue, is one of the most unattractive that possibly could be offered to a gentleman of capacity and ambition. In Opposition I agree it is rather different." That was a graphic picture which J A R Marriott drew in a single brief sentence "Gagged and salaried, the private member is expected to dedicate to the service of his party not his brains but his legs " <sup>2</sup>

All this means that England is not tending toward democracy, but is reverting to autocracy A half a century ago Edward A. Freeman scented this. "In England," he observed, "we now universally use the word 'Government' where in my boyhood everybody said 'Ministry' or 'Ministers' Then it was 'the Duke of Wellington's *Ministry*' or Lord Grey's: now it is 'Lord Beaconsfield's *Government*' or Mr. Gladstone's This change, if one comes to think about it, certainly means a great deal " <sup>3</sup> In 1891 Sir J R Seeley was more specific, saying in one of his lectures. "The result of all these considerations is to show that the tempting image of Parliament as representing the general meeting of a society, and the Minister as its paid secretary, who carries into effect the wishes expressed by its members, is utterly misleading The Minister is not the servant of Parliament, but its king He does not carry into effect the wishes of others, but his own wishes It is a sort of high treason when the Minister gives up his own view in deference to Parliament. If he must give up something, it is his duty to give up, not his view, but his office " <sup>4</sup> And Sidney Low is equally positive as to the seat of the lawmaking power. "When we say that the

<sup>1</sup> *The Governance of England*, 59

<sup>2</sup> "The Constitution in Suspense," *Nineteenth Century*, January, 1914

<sup>3</sup> E A Freeman, *Some Impressions of the United States*, 114 (1883).

<sup>4</sup> *Introduction to Political Science*, 220, 221.

House of Commons makes the law, we use language that no more conveys the facts than the legal formula, which tells us that every statute is enacted by the King with the advice and assent of Parliament. New laws are made by the Ministry, with the acquiescence of the majority, and the vehement dissent of the minority, in the House of Commons. The Crown has nothing to do with the matter, the House of Lords very little, except that it has a limited power — seldom exercised in cases of real importance — to delay the operation of the proposed measure."

Evans Clark, telling the story of Woman Suffrage in Parliament,<sup>1</sup> made out a strong case for the theory that the Cabinet controls Parliament, not Parliament the Cabinet. He showed that in the course of a contest which he analyzed from 1869 to 1913, the convictions of a majority of voting members were blocked from effective expression no less than seven times. The record revealed twenty instances where what may have been a majority of the members were not allowed to register their convictions even on a second reading. He presented proof that individual members, even though they include a large majority of the party in power as well as a voting majority on the opposition benches, cannot make over their convictions into the law of the land in the face of Cabinet opposition.

Duncan Schwann, himself a member, declaring in 1908 that the House sits, to all intents and purposes, solely to register the decrees of the Cabinet, and to discuss and pass those measures which the Administration introduces, ascribed to this a very significant result. Parliament, he said, is deprived of the advantage to be reaped from individual efforts toward much desired reforms. Such reforms must wait for consummation until the Government itself is prepared to get its vast bulk underway, till the interminable rivalry between the advocates of different panaceas has been settled, and the conflicting opinions of Ministers have been reconciled, or, at any rate, until the divergence of view has been concealed. No tentative efforts are encouraged in legislation, trial steps are not taken to see if the ground is favorable for advance, progress is not advanced piecemeal.<sup>2</sup>

<sup>1</sup> *Am Pol Science Review*, May, 1917.

<sup>2</sup> *The Spirit of Parliament*, 176.

## CHAPTER X

### RESPONSIBLE GOVERNMENT

AN AUTHORITATIVE work on the governmental processes of England's lawmaking territories is Arthur Berniedale Keith's "Responsible Government in the Dominions," published in 1912, exhaustive and judicious. It covers the ground so admirably that I shall make no attempt at independent study, but shall rely upon it for such statements of fact as have pertinence to our problems, with such expressions of opinion as may seem helpful, asking it to be remembered that they are the judgments of Mr. Keith.

At the outset he perplexes an American reader by using the terms "representative government" and "responsible government" in contrast as having significances different and distinct. It turns out that by "representative government" he means the form that was familiar to the American colonies — a Governor appointed by the Crown, a Council with both executive and legislative authority, and an Assembly chosen by the freeholders of the Colony. By "responsible government" he means the form found in England itself — the Crown (of course in a colony its representative), and a legislative body in which predominates a Ministry combining executive and legislative functions, and depending for its continuance on the approval of a majority of the legislature.

"Representative government" as thus conceived has not been a success under British guidance. One by one the colonies have abandoned it until there remain as full members of this class only the Bahamas, Barbados, and Bermuda. However, Mr. Keith thinks it would be premature to pronounce that the system of representative government is fundamentally unsound as a permanent solution of the relations of the Executive and the legislature. "It has existed," he says, "and still exists in certain parts of the world, and has worked with some success."

Although he does not point it out, the critical thing may be the manner of providing the Chief Executive. This may explain why "it has been found impossible," as he says, "to reconcile relations of the executive officers, appointed in many

cases from outside, with the legislature of the day. The legislature, on the one hand, has been helpless in the face of its total inability to secure the adoption of a policy in general harmony with its desires and aims, while on the other hand the Executive Government, forced to rely upon the legislature for the greater portion of its pecuniary resources, has been thwarted and harassed in its aims by the resistance of a body over which it has no efficient control." This state of affairs is of course but a repetition of what was happening in America from the settlement of Virginia to the Declaration of Independence, and is bound to happen wherever a chief executive unrepresented in the General Assembly, tries to play a part in the making of the laws.

We modified that kind of "representative government" by devising a Chief Executive whose main function was to execute the laws, not make them. The change in the dominions remaining in the British Empire has been in another direction, to "responsible government." It began about 1840, in Canada. Singularly enough, it did not come about through any formal action. Not a word about it is to be found in the Act of 1840 for uniting the Provinces of Lower and Upper Canada, nor in the royal instructions to Lord Sydenham and his successors. Their commissions provided for an Executive Council, but did not say it was to be composed of responsible ministers. It seemed to be contemplated that this Council was to be a body to advise the Governor, who might or might not take its advice. The real authority for the innovation, or rather for applying the home system, was in dispatches from Lord John Russell, of October, 1839, in which he laid down the principle, directing that the chief officials should not be deemed to hold office by a permanent tenure, but should be liable to removal when motives of public expediency might suggest its advisability. Not until Canada's independent existence as a province ended, was there anything more formal or binding than this. It worked because the Governors carried it out in good faith, but of course it could not have worked had they been without the power of appointing the members of their Councils, and of dissolving the Legislature when occasion came for determining the pleasure of the electorate. Like powers would be necessary in any American State or for the nation itself if a change to the English plan were ever desired.

The provinces of Canada have the same system of "responsible government." Each has at its head a Lieutenant-Governor, and the established usage is that he shall govern with the support of a Ministry, who again must have the support of the Legislative Assembly, and that Ministers will retire when defeated unless they ask for and receive a dissolution of Parliament. The Lieutenant-Governor is controlled by the power of the Assembly to refuse the annual Appropriation Act. Indeed it is certain he would now be dismissed by the Dominion Government before anything so drastic took place.

Canada like the mother country is concerned about the dissolution problem. The tendency is said to be toward the formation of groups independent of the historic political parties. When a small assembly breaks up into three or more groups, naturally it is more difficult for a Ministry to rely upon the support of a homogeneous majority. There are indications that the Canadians are likely to modify the theory of close interdependence between Ministry and Legislature. It is urged that a Government should not be expected to resign for any adverse vote that does not amount to a direct censure or to a formal withdrawal of confidence.<sup>1</sup>

In the British Dominions appears discontent with the Crown's practice of designating the Chief Executive without consulting the wishes of the State or Colony. This has developed most in Australia. Although the State Premiers in conference at Brisbane in 1907 passed a resolution against any interference with the existing system, in 1908 and again in 1909 the Legislative Assembly of Victoria resolved in favor of having Governors appointed from among residents of the States instead of from England or elsewhere. The discussion has continued, but there is likely to be no change until public opinion in each Dominion concerned, an opinion now divided, becomes unified.

It is in Australasia that responsible government has notably failed to achieve conditions with any fair degree of permanence. In the case of the Australian Commonwealth changes have been incessant since the federation was established in 1901. In the case of the States there has been the same lack of political continuity. Up to 1912 there had been 34 Ministries in New South Wales, since 1856, in Queensland, 26 since 1859, in South Australia, 41 since 1856; in Victoria 33, and in Tasmania 27. Some

<sup>1</sup> H. A. Smith, *Federalism in North America*, 92.



of the Ministries have been comically brief. Thus in 1899 V. L. Solomon was Premier of South Australia for ten days, and Mr. Earle's Government in Tasmania in 1910 rivalled Mr. Solomon's in brevity. The Ministry of Sir E. Braddon in Tasmania lasted from 1894 to 1899 and is spoken of as "long" Ministries in the Cape have been more stable, averaging about four years in the period from 1872 to 1910. New Zealand has had comparatively few changes.

One remedy for this unfortunate state of affairs in Australia, suggested and to a certain extent insisted upon in recent years, is to have elected Ministries, in the hope that with fewer changes, administration at least can be carried on effectively. The subject has been discussed a good many times, and was examined in New Zealand in 1891 by a committee, which made a long report, but so far nothing has resulted from the discussion. Mr. Keith finds it difficult to see how elective Ministries can be harmonized with effective parliamentary government, and thinks it very doubtful whether after experience of full parliamentary government any Dominion or State would care to confine itself to a position in which the Ministry of the day was independent of votes in Parliament, and for a fixed period could not be displaced. But he admits that constant changes of Ministry, such as take place in the Australian Commonwealth, are opposed to all efficient administration, and he has no other remedy to suggest than to refrain from changes in the administration except on substantial grounds, and when changes are made, to appoint new members to the vacated posts rather than transfer existing members to them, thereby upsetting the whole scheme of the Government.

Canada appears to be the only important part of the British Dominions where "responsible government" (Cabinet government) has brought with it anything like stability. Since the Dominion was formed in 1867 by the British North America Act, its Constitution, there have been fewer changes of party control than in the case of the executive branch of the United States Government in the same time. Exact comparison, however, is impossible because control of our legislative branch does not necessarily accompany, as in Canada, control of the executive.

In the Canadian Provinces things have been different. Ministries have been less clearly determined on political grounds and

so less stable, but in recent years governments have averaged reasonable duration.

Mr. Keith combats the popular conception of responsible government in the Dominions as one where the Ministers govern while the Governor looks on, and he thinks Goldwin Smith delivered neither a wise nor a just utterance when he wrote: "A Governor is now politically a cipher, he holds a petty court and bids champagne flow under his roof, receives civic addresses and makes flattering replies, but he has lost all power not only of initiation but of salutary control" None the less, says Mr. Keith, there are many important functions yet in the hands of the Governor, and he may exercise an influence over the Colony of which he is Governor much greater than is suspected by outsiders who do not realize the working of the Government. It is admitted, however, that this is essentially a matter of individual character, not of constitutional stipulation.

Adam Shortt, a Canadian having intimate acquaintance with the political affairs of his country and a judicious observer, has written somewhat more specifically of actual effects. "The executive government," he says, "being held responsible for every law passed and for all acts of administration, is constantly on trial before the people. Its parliamentary supporters are equally on trial, though in a somewhat minor degree. Every member of Parliament is a touchstone of public opinion in his district and if a supporter of the Government he is not backward in admonishing it as to any unpopular line of action which it is taking. The very Government itself may be divided in opinion on this or that policy. These differences may be due either to personal convictions or to the popular sentiment of the districts which the members of the Government represent. If they can compromise their differences, well and good, but if not, more or less radical reconstruction of the Cabinet may be necessary. Thus a continual process of adjustment to public opinion is going on, alike in the ranks of the Government and of the opposition. It is in this connection that the Canadian parliamentary system provides a very effective barometer of public opinion and is therefore a very effective instrument of democracy.

"Now it does not follow, of course, that only the higher and more worthy aspects of public opinion are alone effective in this process of parliamentary government. The very effectiveness of the Canadian system of government as a democratic instrument

renders it capable of expressing the worst as well as the best elements of public life. Indeed the very necessity for the Executive Government to maintain itself in power through the support of a majority of the members of the legislature, while it largely frees it from the control of a sinister element limited in numbers but powerful in instruments of corruption, at the same time forces the Government, especially when its majority is narrow, to employ the greater part of its political and administrative influence to maintain itself in power. It is thus often sorely tempted to forego the higher and more far-reaching interests of the country and of itself in favor of local, special, and temporal interests, calculated to carry constituencies individually, rather than by appeals on wider and more national grounds."<sup>1</sup>

A personal experience brought home to me the essential difference between the legislative methods of Canada and the United States. When Mackenzie King sought to secure the passage of the Canadian Act for the Investigation of Industrial Disputes, it was necessary for him only to convince the Ministry of its wisdom. The law was in operation before the leaders of organized labor were fully awake to all it meant. Once in force it justified itself, proving the most hopeful way of dealing with industrial disputes and of lessening strikes that has yet been devised. Opportunity came to me to try to get the system adopted in Massachusetts. King began at the top, with the Cabinet. I had to begin at the bottom, with the people, as represented by a legislative committee looking to public opinion. The labor leaders decided to oppose and decision was reached without the benefit of experiment. In this particular instance I naturally believed wiser conclusion would have been reached by a dozen men of self-reliant judgment, ready to take the responsibility of independent determination. Yet it does not follow that in most cases the safer course may not be to require first the convincing of the mass of the citizens, whose approval and support must be the bulwark of law.

In Barbados appears a unique system. There the Attorney-General submits to the Assembly the proposals recommended by the Administration and attends to the process of enactment. He has no party support to depend on, but neither does he have to encounter party opposition. Every measure stands on its

<sup>1</sup> "The Relation Between the Legislative and Executive Branches of the Canadian Government," *Am. Pol. Science Review*, vii, 192 (May, 1913).

ments. When some specific matter arouses political controversy, it is taken into the elections by opposing candidates. "The system promptly and effectually ascertains the will of the people on any issue, and at the same time excludes party excitement from the ordinary routine of government. It is a striking circumstance that the statesmanship of a negro took a leading part in establishing this unique system, which works so smoothly and successfully."<sup>1</sup>

#### IN FRANCE AND ELSEWHERE

In France, the land of Montesquieu, the doctrine of the separation of powers with which his name is linked, has had rare acceptance. After the absolutism of the Bourbons gave way to the absolutism of democracy, and that in turn had collapsed, Napoleon in theory approached the Montesquieu ideal. "No one," he is reported to have said, "can have greater respect for the independence of the legislative power than I. But legislation does not mean finance, criticism of the administration, or ninety nine of the hundred things with which in England the Parliament occupies itself. The legislature should *legislate*, i.e. construct grand laws on scientific principles of jurisprudence, but it must respect the independence of the Executive as it desires its own independence to be respected. It must not criticize the Government."<sup>2</sup>

By the Constitutional Charter that Louis XVIII gave to France in 1814, the King alone was to propose laws. They could be discussed, adopted, or rejected by the two Chambers, but not amended without his consent. If he did not propose, they might petition, but only once in a session. In 1830, before the Chamber called Louis Philippe to the throne, it drew up a Constitution to which he took oath, one of its provisions being that both Houses should enjoy the right of initiation. Louis Napoleon took that right away.

With the Constitution now in force came a nominal Executive almost as impotent as the King of England, and, under the

<sup>1</sup> H. J. Ford, "The Success of Barbados," *Scribner's Magazine*, November, 1919.

<sup>2</sup> Sir Courtenay Ilbert credits the quotation to Sir J. Seeley, *Introduction to Political Science*, 216, from a letter addressed by Napoleon to Sieyès. Ilbert says he has been unable to find this letter and doubts whether it exists, but says the quotation is an accurate summary of opinions which Napoleon is known to have expressed. *Legislative Methods and Forms*, 208.

Cabinet system, a real Executive commingled with the legislative. The system does not work so smoothly in France as in England, partly because of difference in temperament, partly because of difference in political organization. If a Ministry is to resign when it loses the support of a majority in the representative chamber, the temperament of the people must ensure reasonable infrequency of change or else there can be no continuance of policy long enough to produce the best results. The French are more volatile than the English, and hence one of their parliamentary troubles. Furthermore, the Cabinet system works best where the people are for the most part grouped in two political parties. In France as elsewhere on the Continent, the two-party idea has not prevailed. The people divide into numerous groups, some of them nothing but factions. Any one group rarely has a majority in the representative body. Usually, therefore, Ministries must be made up of members of different groups, with the probability of inharmonious consequences. The constant shifting of group combinations adds to the likelihood that support for the Ministry will be brief. There have been ninety-eight Ministries in sixty-five years. In the period of twenty months from June, 1932, to February, 1934, there were six of them. These changes take place without consequent resort to the electorate unless they come with the end of the four-year term of the Deputies, for dissolution takes place only upon the order of the President, with the consent of two thirds of the Senate which has occurred but once. None has taken place since 1877.

There are about a score of parties in the Chamber. One result is that the Ministry is not looked upon as an organ of the Assembly, as its chief committee, as something normally breathing the spirit and will of that body, but as something more or less external, independent, probably hostile. The situation psychologically is much the same as it would be if the Cabinet of an American President were to attend in the House of Representatives for the purpose of leading its deliberations. The Cabinet officers would be fortunate to find there more than a few friends. In France, therefore, naturally and inevitably, a session of the Chamber is a battle, with the odds against the Ministry. One technical difference from the English system adds to their handicap. In England some of the offices held by Ministers are sinecures, involving no administrative duties. This permits some

of the strong men of the Cabinet to be free of responsibilities other than those connected with lawmaking. In France each Minister is the head of a working department, as would be the case if members of an American Cabinet sat in Congress. On the other hand, French Ministers have the advantage of the right to entrust the task of explaining projects of law and the various clauses thereof to expert officials, known as commissaries. An English Minister is supposed to know it all and only when at a loss does he refer to the under-officials sitting near the Speaker's chair.

In Italy the situation before dictatorship was much as it is in France, though it was said that the individual member had somewhat more chance to get consideration for his proposals than in most of the other countries using the Cabinet system. The bulk of the important legislation, nevertheless, was that which the Government began and carried to a conclusion.

In the Kingdom of the Netherlands, as it was created by the Congress of Vienna for a bulwark against France, the Chambers of the States-General were but to accept or reject measures submitted by the Government. Power to initiate came only with the revised Constitution of 1848.

Norway has had an instructive experience. The Constitution it adopted in 1814 carried separation of the powers so far that the Councillors who made up the executive department were forbidden even to enter the legislative halls. The theory was that this would secure the dignity and power of the representative assembly, but it was found to work just the other way, and the democratic party that had insisted on shutting out the Councillors, now insisted they should be brought in, while the court party opposed the demand. The struggle had reached the verge of civil war, when in 1884 the King at last yielded and the cabinet heads accepted the responsibility of presenting their measures and explaining their acts in the presence of the assembly. This virtually converted Norway into a democratic republic under royal presidency.<sup>1</sup> No method for dissolution is provided, the argument being that inasmuch as the term of the assembly is for but three years, more frequent election is unnecessary. Change of control within that term is improbable, for by-elections are few, as deputy members are elected to take the place of members who fall ill, die, or are permitted to retire temporarily.

<sup>1</sup> H. J. Ford, *Representative Government*, 180

In Sweden the Ministers, individually and collectively, exercise far less direction over the work of the Riksdag than do the Ministers in an English Parliament. This results from a thoroughly organized system of committees functioning almost as a second Government. There are seven of them, made up of members from both chambers, and under the Organic Law all measures must be referred to them or to special committees before action in the chambers.<sup>1</sup>

The Cabinet system did not prevail in the German or Austrian Empires. In each country the Emperor selected his own Ministers and they were responsible to him alone. The legislative body could reach him only through what control it might have over supplies. This was considerable enough to encourage the appointment of Ministers likely to get the support of a group or combination of groups with a majority in the lower branch. If the head of a Cabinet could not get or if he lost such a majority, he did not resign, but went on as best he could, trying the chance of an election or not as he thought wiser. Bismarck believed the monarch should govern and such was the dominant belief in Germany when she went into the World War. A few months before its outbreak, in December, 1913, for the first time in the history of the Empire a vote of censure directed against the Government was debated, as a result of the famous Zabern affair, which had brought to a head the antagonism in Alsace-Lorraine between the civil population and the professional soldiery. The vote of censure was passed by 293 to 54, but the Chancellor refused to resign. In his speech he took the ground that parliamentary government did not exist in Germany, and that it was the constitutional privilege of the Emperor to appoint the Chancellor without any assistance or advice from the Reichstag. Former Ambassador Gerard thought this episode was perhaps the final factor that decided the advocates of the old military system of Germany in favor of European war.<sup>2</sup>

The internal dissensions brought by the war led to the demands for responsible government that ripened in the Constitution of 1919. This instrument declared the National Chancellor and Ministers should require for the administration

<sup>1</sup> Walter Sandelius, "Dictatorship and Parliamentarism," *Political Science Quarterly*, September, 1934.

<sup>2</sup> *My Four Years in Germany*, ch. iv.

of their offices the confidence of the National Assembly. They were to have the right to be present at the meetings of the National Assembly and its committees, and their presence might be required. They were to be heard even outside the regular order of business, but it was specified that they were subject to the authority of the presiding officer in matters of order. Likewise they were to have the right to take part in the proceedings of the National Council and its committees, and upon request it was to be their duty so to do.

A few thoughtful Germans foresaw the dangers and difficulties in the application of the English system to nations with political traditions and habits so different from those of England. Said one of these men, Walter C. Simons, former President of the Supreme Court of the German Republic, in an address to the American Bar Association at Memphis, Tenn., October 23, 1929: "Together with Professor Max Weber of Munich, one of our strongest and clearest political intellects, I strove with all my might to secure for the President of the Reich a similar position to that of the President of the United States. I firmly believe that Parliamentarism would not have become so unpopular as it is now in Germany if we had given to our President the faculty of nominating a Cabinet on his own responsibility and not at the tender mercy of many parliamentary factions."<sup>1</sup> His view is to be commended to the attention of those Americans who think our system the worse.

Ministerial responsibility in its full sense is incompatible with giving the Chief Executive any decisive share in the naming of his Cabinet, for that means impairing by so much the power of the legislative branch to determine the Government. In the new Constitutions adopted by Continental nations the democratic impulse, with its reaction from monarchies, showed in varying degree its wish to curb executive power, by increasing that of the legislative branch. For instance, Latvia, Lithuania, and Estonia went so far as to give to the lawmaking body the duty of electing the executive Government. In the matter of dissolution the first method provided in Poland quickly gave trouble. The Parliament could be dissolved by a two-thirds vote of the Diet (the lower branch) or by the President with the consent of the Senate, given by a three-fifths vote with at least half the members present. This proved so unsatisfactory that

<sup>1</sup> *Am. Bar Association Journal*, December, 1929.



by amendment of the Constitution in 1926 the power of dissolving was given to the President, with requirement that the order must be countersigned by the Prime Minister and all the Cabinet

Except in Finland, all the democratic Constitutions framed by the Continental nations in the decade after the World War required the Ministry to resign upon a vote of no confidence by the legislative body. It may have been observation of what followed that led Spain, writing a new Constitution in 1931, to stipulate that a vote of censure must be recommended by fifty members of the unicameral Congress of Deputies, which might not be discussed or voted upon within five days, and that a Government or a Minister should not be obliged to resign unless by absolute majority vote. The President was to have the right to dissolve, but to exercise it not more than twice in the course of his six-year term. After the second exercise of that right, the first act of the new Cortes must be to determine if it was necessary, and an unfavorable vote by absolute majority would carry with it the removal of the President from office.

Two years later, with that much more of opportunity to watch the difficulties of divided responsibility, Portugal, framing a new Constitution, said: "The Government shall be dependent exclusively upon the confidence of the President of the Republic and its continuance in power shall not depend upon the fate which its bills may have nor upon any vote of the National Assembly" The President was to appoint and dismiss freely the members of the Cabinet, save for approval of the President of the Council, virtually the Prime Minister. Allowed to sit only three months in the year, the National Assembly would have limited chance to embarrass the Government

Turkey, beginning the new constitutional régime with election of its President for a term of eight years, changed this so that he should serve for only the life of the Assembly, thus taking away most of justification for power to dissolve.

Generally speaking, the new Constitutions on the Continent did not require that Ministers should be selected only from members of the lawmaking body. The right of dissolution was not put in the hands of Ministers. Votes of lack of confidence were not so surely as in England to secure a completely new Government

The South American republics have for the most part followed a course between the English system and that of the United States. Chile has come nearest to ministerial responsibility, but through custom, not by constitutional provision, Ministers resigning as a matter of course when losing the support of a majority of the legislative branch. This has resulted in great instability, with many governments lasting but a few months. Uruguay, in 1919, replaced her Constitution of 1829 with one requiring fairly strict separation of powers. Argentina, Bolivia, and Brazil do not have ministerial responsibility, and though the Venezuelan Constitution of 1914 seems to have intended otherwise by giving the Chamber of Deputies the right to censure, in practice the President, through full power to appoint and remove, became the sole authority to whom Ministers were responsible.

In Argentina the Ministers are expressly forbidden to be members of the legislative branch, though they may attend sessions and engage in debate, but not vote, as also in several other South American countries. In Brazil, they may appear before committees, but not in the Congress itself. In Peru, though they may attend debates, they may not be present when a vote is taken. In Uruguay a member may, through the President of his Chamber, request from Ministers "the facts and information which he considers necessary for the performance of his duties," and if they are not forthcoming, may request them through the Chamber itself. By a one-third vote Ministers may be requested to attend for questioning and information. Power for the President to introduce bills, either directly or through a Minister, is common.

In view of the more volatile temperament of peoples with Latin origin, it is hard to tell whether or not the frequent changes of government and general instability in Latin American countries are due to defective parliamentary institutions, but it is safe to say that the attempt to improve upon the system of the United States by coupling with it features of the English system has not proved such a success as to encourage imitation. Also there is instruction in the fact that in South America the tendency is to increase the power of the legislative at the expense of the executive branch, contrary to that in Europe and the United States.

It is singular that while our citizens, as a whole, refuse to

give serious consideration to proposals for change to the system of ministerial responsibility, that system has been put into effect in one of the possessions of the United States, the Philippine Islands. It came about almost by accident. The Jones Law of 1916 gave the Philippine Senate power to approve Cabinet appointments. Thereupon the Legislature passed an act providing that the Governor General should make these appointments at the beginning of each regular session. His budget and other recommendations being submitted at the same time, the dominant party in the Legislature saw and took its chance to bargain with the Governor General, much as did our assemblies in the colonial period. He could have his legislation if the Legislature could name the Cabinet. Establishment of ministerial responsibility was completed when in 1918 Governor General Francis Burton Harrison by executive order created a Council of State, consisting of the Speaker of the House, the President of the Senate, and the members of the Cabinet. The Governor General was to preside, but of course the dominant party controlled decisions. When General Wood became Governor and sought to have the system abolished, President Coolidge in a letter to a Filipino representative in Washington said that a responsible Ministry is incompatible with "the fundamental ideals of democratic republican government."

This view prevailed when the Convention came to frame the Constitution for an independent nation that was approved by President Roosevelt March 23, 1935. In this respect it read. "No member of the National Assembly shall hold any other office or employment in the government without forfeiting his seat." Yet it did not go the whole distance in separating the powers, for it further said. "The heads of departments may upon their own initiative or upon the request of the National Assembly appear before and be heard by the National Assembly on any matter pertaining to their departments."

#### QUESTIONING MINISTERS

To elicit helpful information by means of questions addressed to officials on the floor of the House, is an attractive possibility that interests many who think it feasible to introduce here at least some part of the English system. Modern development of the practice appears to have worked well in England, badly in France. The methods and results in the two countries

should be studied if we are to experiment in the same direction.

In England any member has the right to address a question to any Minister of the Crown, who is also a member of the House, about the public affairs with which the Minister is officially connected, or a matter of administration for which he is responsible. The proper object of such a question is to obtain information on a matter of fact within the special cognizance of the Minister, and the rules and practice of the House limit the right to ask questions so as to confine them to this object. Except in special cases, notice of question must appear on the notice paper of the House at least one day before the answer is to be given, so that the Minister may have time to prepare his answer. A Minister cannot be compelled to answer a question, and sometime declines so to do on the ground of public interest. It is for him to determine what kind of an answer is likely to be considered proper and sufficient in the circumstances of the case <sup>1</sup>

If a member wishes his question to be answered orally, he marks it with an asterisk, and a period of about three quarters of an hour is set apart on four afternoons of the week for the answering of such questions. In the course of that period supplementary questions may be asked within limits determined by the Speaker, but no debate is allowed to arise directly, and this is the important respect in which the English practice differs from the "interpellations" of the French chamber. If however the House is not satisfied with the reply to an important question, the questioner may ask leave to move the adjournment of the House, and if forty members support him, debate going to the substance of the topic follows. Either the whole Government or the Minister concerned is expected to resign if defeated on this motion. This method of raising the vital issue is waning. From 1923 to 1933 there were only seven motions for adjournment of the House, made to discuss a matter of urgent importance <sup>2</sup>

The right of questioning is somewhat limited by the fact that the Speaker is the judge of the propriety or admissibility of any question, and may disallow it if, in his opinion, it is of unreason-

<sup>1</sup> Sir C. P. Ilbert, *Parliament*, 112

<sup>2</sup> Robert W. McCulloch, "Questions in Parliament," *Am. Pol. Science Review*, December, 1933

able length, or contains statements of an argumentative, ironical, or abusive nature, or if it refers to any debate that has been held in the current session, or again, if it reflects on the character or conduct of Ministers or members of the House, or if it asks for a mere expression of opinion, or for the solution of an abstract question, or is a hypothetical proposition<sup>1</sup>

Although questions are known to have been asked of Ministers in Parliament as early as 1721, and undoubtedly were asked long before that, though not recorded, the question system really dates from the daily printing of the orders of the day in 1841. For some years thereafter they did not amount to more than a few dozen in the whole session, but with 1849, when they were placed first on the paper, their number shot up to more than two hundred, after which the increase was steady. By 1870 they had passed the thousand mark. On one day in 1889 there were 85 printed questions, which included 232 separate interrogatories and were supplemented by 95 others, making a total of 327 in a single evening. In 1920 the total for the session had gone above 5000. From 1920 to 1933 there were 281,000 for oral answer (including "private notice to members"), and more than 80,000 for written answer. In 1920 the number of questions for oral answer at any one sitting was limited to three.

The questions are usually printed in the Orders of the Day, but when urgent or exceptionally important may be asked without being printed if notice has been given to the Minister involved, or with the consent of the Speaker. The answers to the written questions are prepared by the permanent staff of the Department concerned. In most cases all the Minister has to do is to read them. It is just possible to rush through the hundred questions in an hour.

T. P. O'Connor, writing in 1900, said he regarded the power of asking questions as one of the very best features of the Parliamentary system. "The questions are often foolish, frequently they are petty, often they touch on subjects which should be given to local assemblies, and rigorously excluded from the House of Commons. But still these questions enable every member, whether articulate or inarticulate, whether wise or unwise, great or small, to bring before the House every possible subject of interest that may be connected with the vast machinery of social life in the Empire, and this period shows the House in its

<sup>1</sup> Sidney Low, *The Governance of England*, 91

best and most useful aspect — namely, as the Grand Inquest of the Nation.”<sup>1</sup>

More recently Sir C. P. Ilbert has said. “There is no more valuable safeguard against maladministration, no more effective method of bringing the searchlight of criticism to bear on the action or inaction of the executive government and its subordinates. A Minister has to be constantly asking himself, not merely whether his proceedings and the proceedings of those for whom he is responsible are legally or technically defensible, but what kind of answer he can give if questioned about them in the House, and how that answer will be received.”<sup>2</sup>

The merits of the system have also been urged by President Lowell of Harvard, whose judgment on foreign parliamentary matters carries weight. “Government with us ought to be kept on the grill a great deal more than is done now,” said he to a committee of the New York Constitutional Convention. “There should be some method by which the Legislature could direct interrogatories to the heads of departments. That is done constantly in England, this is what keeps the civil service in Britain up to the mark and the bureaucrats in a constant and wholesome fear of Parliament. We have investigations of officials — yes, but we have not enough of them, and we make the mistake of starting our inquiries in a spirit of hostility to the official whose department is being investigated when we would attain much better results by going about it in a friendly spirit and for the only helpful purpose of obtaining information regarding defects that should be remedied.”<sup>3</sup>

Yet results in England have not wholly escaped criticism. Sir C. P. Ilbert admits that asking questions in the House is one of the easiest methods by which a member can notify to his constituents the attention which he devotes to public affairs and to their special interests. “For this and other reasons, the right to ask questions is especially liable to abuse, and its exercise needs careful supervision by the Speaker and those acting under his authority.” Frederic Harrison says: “No Minister worth his salt ever tells anything that he does not desire to be known; and, as he seldom tells more than a fraction of the truth, he only misleads those who are weak enough to believe him to be

<sup>1</sup> “Some Absurdities of the House of Commons,” *No. Am. Review*, Aug., 1900.

<sup>2</sup> *Parliament*, 113.

<sup>3</sup> *Boston Herald*, June 11, 1915.

telling the whole.”<sup>1</sup> Lord George Hamilton, publishing his reminiscences in 1916 after an exceptionally long career in public life, declared “A very large proportion of the questions put and motions made are of no public use whatever. They are mere personal advertisements. I can truly say that for the last ten years of my Parliamentary life a vast proportion of the hours which I spent inside the Chamber was sheer waste of time.”<sup>2</sup>

Most observers, however, agree that in one respect questions in Parliament have become of grave importance and great value. They furnish almost the only means left of controlling the Government piecemeal, so to speak, that is, in matter of detail. They get better administration. Furthermore, they furnish to the individual member almost his only remaining opportunity to exert influence. As for the Government itself there is the advantage of being able to correct misunderstandings and give information without the danger of misquotation to which all American executives are exposed by the necessity of reliance upon the press. For these reasons there are those who hold that questions have become an almost indispensable feature of the British government.

Written questions formed part of the original features of the Belgian Chamber as determined in 1831. They were introduced into the assemblies of France, Italy, the Netherlands, and some of the countries that adopted republican institutions after the World War. In Belgium questions are signed by not more than three members and go to the President of the Chamber. The answers are published in the official records on the following Tuesday. In the session of 1912-13 there were 2,487 such questions. In Italy, at least up to Mussolini's time, on the day after the receipt of the written question the President read it out to the Chamber, and although Deputies could ask for written answers, customarily the President replied orally. The questioner might then take not more than five minutes for stating if he was satisfied with the reply. Forty minutes at the opening of each session were available for this procedure, and as a rule fifteen questions were answered.

In France there are two ways of interrogating — question and interpellation. The question may be oral or written. If

<sup>1</sup> “Parliamentary Procedure,” *Nineteenth Century*, April, 1906

<sup>2</sup> *Parliamentary Reminiscences and Reflections*, 210

by word of mouth two speeches only are permitted, one by the questioner and one by a Minister in reply, the procedure seldom interesting anybody. A written question is printed in the *Journal Officiel* and replied to there. This method, adopted in 1909, has lightened very considerably the order of the day for public sittings and has often provided a rapid solution of petty disagreements that threatened to become as embittered as they would be endless.<sup>1</sup> On the other hand it has proved too facile a method for members to attract the attention of the public and especially that of their constituents, the result being a mass of questions on petty details, such as, for example: "Why has not such-and-such a gendarme received the promotion he deserves?" Here is another, adroitly gratifying a friend by advertising his wares: "Why is a certain provision merchant (named) having very good wine in his cellars not allowed to sell it to convalescent soldiers?" It is to be feared that not a few American legislators would jump at such opportunities to curry favor. In France, however, more serious has been the resulting burden thrown on the staffs of the Ministers, with large waste of their time.

A question generally relates to a detail of administration. An interpellation ordinarily goes far beyond that, reaching the gravest matters of policy and endangering the life of the Ministry, for at the end of a general debate in which all members can take part, a vote is taken and if that goes against the Government, it must resign. This procedure is alleged to be one of the chief causes for the inefficiency of the Chamber of Deputies. It was intended as a method for interrogating the Ministers on their general policies. It was to be in effect a challenge of the Ministry on some matter of importance, and was expected to secure debate on a high level. Unfortunately it degenerated into a device for harassing attack and what Americans call "playing politics," more often attempted for the sake of discrediting the Ministry than to get honest discussion of public policy. "There is no petty incident of local police, no appointment of a functionary, however insignificant," says Professor Duguit, "that is not made the subject of an interpellation." Ministers have been compelled to submit to interpellations on such trivial matters as the remarks of a university professor to his class, the sermon of a country *curé*, an ordinance issued by

<sup>1</sup> Joseph Barthelemy, *The Government of France*, J. Bayard Morris tr., 101



the mayor of a village, what some official was reported to have said about a European alliance, and similar matters.<sup>1</sup> The accidents they cause have had no small share in producing the frequent changes of Ministry that have done so much to make French parliamentary government unstable

American lawmaking bodies lack adequate methods for getting information from the executive branch. Inquiry by committees is excellent as far as it goes, but it does not go far enough. It does not meet the need of men not on the committee. It does not give leaders of minorities full and free opportunity to attack policies and practices of the majority or what in England is commonly called "the Government." The lack of such opportunity for the proper working of the two-party system and whatever obstructs it is unfortunate. The fact that in other lands questions and interpellations have disadvantages should not of itself determine the matter against them for us. It ought to be possible to get their good without their evil. Perhaps presently some intelligent parliamentarian will work out a way to accomplish that.

Meantime it is to be observed that Congress strangely neglects to open up this avenue that leads toward better government. On the face of it the House rule seems to invite entry on the road, but it is too rough to be much traveled. The rule says: "All resolutions of inquiry addressed to the heads of executive departments shall be reported [by the committees to which they have been referred] to the House within one week after presentation." If a committee refuses or neglects to report the resolution, it can be reached only by motion to discharge the committee. By precedent this is a privileged motion, but it is not debatable. So when the majority leader sees something politically dangerous in the proposal, something that might disclose a scandal or at least administrative inefficiency, he easily shuts the door before his followers have much of a chance to rebel. Where a minority can do damage only with the consent of the majority, no damage is likely to be done. Of course the remedy is to give inquiry the status of a parliamentary right recognized by rule. Also of course the rule ought to provide as far as possible against flippancy, waste of time, and the other defects that have developed abroad.

<sup>1</sup> J. W. Garner, "Cabinet Government in France," *Am. Pol. Sc. Rev.*, viii, 360 (1914).

## CHAPTER XI

### CABINETS FOR THE UNITED STATES

ABOUT fifty years ago, a group of strong writers began as if by common arrangement a campaign for the adoption of the Cabinet system in this country. The dreams of one generation are often the facts of the next. When a proposition for reform does not reach fruition in fifty years, when the youths who have been incited with its enthusiasms fail to put it in practice on coming to control, the assumption is that the reform lacked vitality. There appears to-day not the least likelihood that in our time this particular agitation will anywhere among us result in anything like ministerial responsibility. It has, however, already had marked effect in strengthening executive power, and because it goads us toward autocracy, must be faced.

One reason why the doctrine of one-man leadership, if not domination, has made such headway of late is that it is widely taught in the departments of political science with which most of our universities are now equipped, as well as expounded in most of the recent works on that subject. The result is that thousands of young men have come from college into our political life, imbued with the belief that our fathers erred in building the framework of their government on the foundation of checks and balances and the separation of powers. It is of importance, therefore, to consider the arguments that have been advanced. First let us examine the validity of their postulates.

To do this, it becomes necessary to take issue with the scholar who became the President of the United States, Woodrow Wilson. His occupancy of that position doubled the need for criticism here to be uncolored. In the hope, then, of wholly avoiding suspicion of partisan bias, with no purpose other than that of elucidating truth, I question the argument and conclusions of the scholar, not here those of the statesman.

Mr. Wilson may fairly be said to have been the very source and fountain of the movement looking to the adoption of ministerial responsibility in this country. In 1884 he wrote a book on "Congressional Government," brilliant and keen,

presaging the influence he was to wield and the fame he was to win. It was a book of criticism. From cover to cover it breathed censure of the American system, praise of the English system. To be sure, in his Conclusion he disclaimed the purpose of inquiring whether responsible Cabinet government would be here possible or desirable, but though he maintained that he was diagnosing, not prescribing remedies, nobody could lay down the volume without feeling he had been told that the American system is wrong and the English system right. The book has had wide circulation, has been much read in the colleges, and has won many disciples. Its doctrine was afterward consistently preached by its author, and Fate gave to him ever-widening opportunity to make converts.

To analyze in detail Mr. Wilson's presentation of his theme in numerous books, essays, and addresses, would not here be useful. It will suffice to show by examination of a few of his positions, how he has exposed himself to doubt of the soundness of all his argument. For example, take this passage from one of the Columbia University lectures published in 1908: "The modern development of the functions of representative assemblies has been in many ways inconsistent with the real origins and purposes of the practices or institutions in which they had their rise and justification. We now regard them, not as bodies assembled to consult with the government in order to apprise it of the opinion of the nation with regard to what the government is planning or doing, not as bodies outside the government to criticize, restrain, and guide it, but as themselves part of the government, its originating law-making parts. What used to be called the Government, we now speak of only as the 'Executive,' and regard it as little more than an instrumentality for carrying into effect the laws which our representative assemblies originate. Our laws abound in the most minute administrative details, prescribe the duties of executive officers and the method by which statutes are to be put into practice with the utmost particularity, and all the reins of government seem to have fallen to those who were once only its censors." <sup>1</sup>

My reading has wholly failed to disclose to me any period when representative bodies assembled to consult with the government in order to apprise it of the opinion of the nation with regard to what the government was planning. Nothing

<sup>1</sup> *Constitutional Government in the United States*, 15

that can fairly be called a representative assembly was held before Parliament came into being under Edward I. There was nothing of what Mr. Wilson describes in the origin of Parliament, nor do I recognize it at any period in the history of Parliament before the eighteenth century. Certainly nothing of the sort ever existed on this continent. As far as my study reveals, representative assemblies have always been lawmaking parts of government, unless it was otherwise in the early years of Parliament when that body sent petitions to the King, and even then Parliament in practical effect shared in making law. The declaration that representative assemblies were ever merely censors, is quite inconsistent with the generally accepted versions of their history.

Examine another of Mr. Wilson's averments. "Ministerial responsibility supplies the only conditions which have yet proved efficacious, in the political experience of the world, for vesting recognized leadership in men chosen for their abilities by a natural selection of debate in a sovereign assembly of whose contests the whole country is witness. Such survival of the ablest in debate seems the only process possible for selecting leaders under a popular government."<sup>1</sup>

This has led me to investigate the legislative experience of men who had served in the Cabinet and were living at the end of Mr. Wilson's administration, fifty-seven in all (if no deaths escaped my notice). It appears that eleven of them had served in Congress, six others are recorded as having sat in State Legislatures, forty do not seem to have had the chance to show ability by surviving in debate. Of the whole fifty-seven only Mr. Bryan came to the front through parliamentary oratory. Of eighteen men made Cabinet officers by Mr. Wilson himself, seven had served in Congress. Would he have admitted that the other nine had not the qualities of leadership? And why did he not go to Congress to fill their places?

If, however, the system of Cabinet Government proved valuable in developing leaders, it would remain to be shown that no offsetting harm might follow. To those who see in the change nothing but unmixed gain, I commend the words of De Lolme, based on a survey of the history of government in all ages: "I indeed confess, that it seems very natural, in the modeling

<sup>1</sup> "Responsible Government under the Constitution," *Atlantic Monthly*, April, 1886.

of a state, to entrust this very important office of framing laws to those persons who may be supposed to have before acquired experience and wisdom in the management of public affairs. But events have unfortunately demonstrated, that public employments and power improve the understanding of men in less degree than they pervert their views, and it has been found in the issue, that the effect of a regulation which, at first sight seems so perfectly consonant with prudence, is to confine the people to a mere passive and defensive share in the legislation, and to deliver them up to the continual enterprises of those who, at the same time that they are under the greatest temptation to deceive them, possess the most powerful means of effecting it ... If we cast our eyes on the history of the ancient governments, in those times when the persons entrusted with the executive powers were still in a state of dependence on the legislature, and consequently were frequently obliged to have recourse to it, we shall see almost continual instances of selfish and insidious laws proposed by them to the assemblies of the people. And those men, in whose wisdom the law had at first placed so much confidence, became, in the issue, so lost to all sense of shame and duty, that when arguments were found to be no longer sufficient, they had recourse to force; the legislative assemblies became so many fields of battle, and their power a real calamity.”<sup>1</sup>

In the magazine article from which I have quoted, Mr. Wilson went on to say “Popular governments need more than any other governments leaders so placed that, by direct contact with both the legislative and the executive departments of the government, they shall see the problems of government at first hand, and shall at the same time be, not mere administrators, but also men of tact and eloquence, fitted to persuade masses of men and to draw about themselves a loyal following” Tact and eloquence are useful to any man in public life, and the power of persuasion is always to be desired. Our American experience, however, shows that they are qualities relatively unimportant in administrators or advisers, and that even a popular government can survive with its executive departments conducted by men who do not commonly possess these qualities in conspicuous degree Bismarck is reported to have said that the qualities of the orator are not only unlike, but incompatible with, those of the statesman

<sup>1</sup> *The Constitution of England* (1784), bk II, ch 4

Macaulay was of much the same opinion. "Parliamentary government is government by speaking," he declared in his review of Pitt's career "In such a government the power of speaking is the most highly praised of all the qualities which a politician can possess, and that power may exist in the highest degree without judgment, without fortitude, without skill in reading the characters of men or the signs of the times, without any knowledge of the principles of legislation or of political economy, and without any skill in diplomacy or the administration of war. Nay, it may well happen that those very intellectual qualities which give a peculiar charm to the speeches of a public man may be incompatible with the qualities which would fit him to meet a pressing emergency with promptitude and firmness. It was thus with Charles Townshend. It was thus with Windham. It was a privilege to listen to these accomplished and ingenuous orators. But in a perilous crisis they would be found to be far inferior in all the qualities of rulers to such a man as Oliver Cromwell, who talked nonsense, or as William the Silent, who did not talk at all."

More recently that eminent English authority, Henry Sidgwick, whose judgments are so candid, thoughtful, and temperate that they must command confidence and respect, has observed: "The Premier's choice of the heads of departments is seriously limited by the connection of the Cabinet with the legislature. He is practically forced to select them among the leading speakers of his party in the representative assembly, in order that the defence of his measures before the assembly may be as strong as possible. Hence though they are likely to be persons of oratorical talent and parliamentary tact, there is no adequate presumption that they will possess administrative skill: and still less that they will possess the special knowledge required for particular departments."<sup>1</sup>

Something, however, is to be said for the opposite view. President Lowell gives it in his "Government of England" (I, 61, 62). He has nothing to say for what he speaks of as "mere shadowy eloquence," but he does present reasons why we may expect that a leading debater will make a good head of a department. He points out that real weight in the House of Commons must be based upon a knowledge of men, and a power to master facts and grasp the essential points in a situation. "It

<sup>1</sup> *The Elements of Politics*, 123

must be based, in other words, upon the qualities most essential to a good head of a department in a government where, as in England, the technical knowledge, the traditions, and the orderly conduct of affairs are secured by a corps of highly efficient permanent officials. No doubt all leading debaters do not make good administrators. Sometimes a Minister is negligent or ineffective, and occasionally he is rash. There are men, also, who have outlived their usefulness, or who were once thought very promising, and have not fulfilled their promise, but who cannot be discarded and must be given a post of more or less importance. The system works, however, on the whole very well, and supplies to the government offices a few extraordinary, and many fairly efficient chiefs, although it puts some departments under the control of poor administrators."

It is not to be gainsaid that some of the qualities of the good debater are desirable in an administrator. Yet nobody acquainted with public affairs would have any difficulty in naming numbers of useful public officials not gifted in speech, and it is notorious that the most successful leaders in commerce and industry are poor speech-makers. The gift of silence is not to be despised.

In extolling ministerial responsibility, Mr. Wilson commended to us a system under which he had not lived. Over against his view of its appropriateness to our conditions, let me set that of an Englishman, the eminent historian Edward A. Freeman, who may or may not have grasped the spirit of our institutions in the course of a visit to this country, but who surely understood the nature and limitations of those of his own land. "It is hard," he said, "to conceive an elective Governor, above all the Governor of such a State as Rhode Island or Delaware, working through the conventionalities of a responsible Ministry. I would indeed go further, and say that the ministerial system is out of place in a republic of any kind and upon any scale. The whole idea of the responsible Ministry is that they stand in front of the irresponsible King, that his acts are done by their advice, and that they take on themselves the praise or blame of them. The King reigns, but his Ministers govern. But in a republic we naturally expect that the President, Governor, or other chief magistrate, chosen, therefore, presumably for his personal fitness, will himself govern, within the range of such powers as the law gives him. He may need Ministers as assistants

in government, he does not need them to take on themselves the responsibility of his acts." <sup>1</sup>

When the *Lusitania* was torpedoed, it was dwelt on by the Washington correspondents that Mr Wilson did not call together his Cabinet nor consult with any member of it, but, just as Lincoln had done, awefully communed with himself. Thus in the greatest of crises, the test of government by committee failed. Autocracy, not oligarchy, was the resort.

After Mr Wilson stopped teaching politics at Princeton University, Professor Henry Jones Ford instructed the students there in that science, expounding the Wilson doctrine with the vigor of an apostle, carrying it to remarkable extremes. With his view of history likewise I take issue. Observe a few passages from his book, "The Cost of our National Government".

"The cause of the decline of the House stands out plainly in our political history. The efficiency of the House is strictly proportioned to the connection between its legislative power and the executive power. The decline began as soon as the House began to reject executive aid and turned to committees of its own for the formulation of measures for its consideration." (p 69)

"The breakdown of representative government in the United States and the substitution of methods which give the custody of political power to particular interests, are the direct and natural consequence of the application of the doctrine of the separation of the powers" (p 73)

"The general adoption of the principle of the separation of the powers in the framework of State Constitutions soon began the destruction of representative government which is now so marked and which is still rapidly progressing. The separation between the executive and legislative departments perverted the functions of both so as to make them both odious, and it became the aim of the people to strip each of power so far as possible. Executive authority was disintegrated, and legislative authority was curtailed. A system of particular agency was gradually substituted for representative government, and representative assemblies, debarred from their proper function of control, came to be regarded as nuisances to be abated so far as possible" (p 76)

The only conclusion possible from this is that representative

<sup>1</sup> Edward A. Freeman, *Some Impressions of the United States* (1883), 121.



government in this country was at its best prior to the Revolutionary War. No proof of it has come to my notice. Also I fail to find any evidence that the national House, of which Professor Ford was speaking in the first passage quoted, began to deteriorate within a decade of its creation. On the contrary, such light as is thrown on it by Maclay's diary, the letters of Fisher Ames, and other contemporaneous judgments, leads me to conclude that Congress in its first decade was distinctly inferior to what it became when Webster, Clay, and Calhoun were its great luminaries. The Continental Congress and that of the Confederation had been notoriously inefficient.

Turning to conditions in the States, one may be pardoned astonishment at learning that the principle of separating the powers when adopted for the Constitutions of 1776 so perverted the functions of executive departments that the people stripped them of power instantly, indeed coincidentally, inasmuch as the stripping took place in the same documents that separated the powers. As to legislative departments it is hard to reconcile the allegation with the fact that not till toward the middle of the nineteenth century did curtailment of legislative authority get fairly under way. Of the "proper function of control" (Mr. Wilson's idea), there has never been any exercise in America, unless the quarrels between colonial Governors and assemblies can be so dignified.

If England marches away from democracy rather than toward it, those who want us to copy her ministerial institutions should ask whether they are suited to a people still vaunting democratic ideals, still at heart democratic. Walter Bagehot said that cabinet government is possible only in what he ventured to call deferential nations — nations in which the numerous unwiser part wishes to be ruled by the less numerous wiser part. He held England to be the type of deferential countries.<sup>1</sup> Ours has not been a deferential country, or at any rate we have not thought it such. In spite of recent happenings, I still doubt if it is becoming deferential. He who thinks otherwise, must despair of democracy. For my part I prefer the hope that we shall grow in self-reliance. Out of American soil sprang a system of government of which the very root was self-reliance. We shall desert that which brings the sap of life to our political institutions if we turn to a system that encourages men to leave the

<sup>1</sup> *The English Constitution*, ch. ix.

conduct of their affairs to leaders, and to cease depending on their own intelligence in everything save the choice of leaders.

#### DIFFICULTIES HINDERING ADOPTION

He who tries to balance the gains and losses that come from the commingling or the separation of powers has no easy task. The results of the system under which we do not live, are apt to seem the more attractive. Yet even if in fact the merits of the Cabinet system clearly preponderated, it would be almost idle to seek their adoption here, for they are wholly inapplicable as long as we retain that framework of government to which nation and States are accustomed.

Ministerial responsibility is difficult where the legislative body is made up of two branches of almost equal power. The members of the Cabinet cannot effectively answer for the Executive in two places, they cannot repeat their arguments with force or dignity in one branch after having satisfied the other. Then, too, the system assumes a legislative majority in sympathy with the Ministers. Here with an Executive and two legislative branches, under the two-party system there may be four combinations — President or Governor may be opposed by both Houses — or by the upper House — or by the lower House — or by neither House. In the case of opposition by both Houses, the system would be from the outset a disastrous failure. It would be put out of joint if either House should be in opposition. With both Houses supporting the Executive, the system in time might become workable, but only at the expense of subordinating one House to the other. That would come about through the selection of members of the Cabinet from the House showing the more power, or their assignment to seats in that House. Thereupon it would become the more attractive body for men of ambition, and the other branch would sink into insignificance. Something of the sort has actually taken place in Canada. The difficulty has brought embarrassment in France. In England it has helped toward the fall of the House of Lords. Nowhere has it yet been successfully met.

That in Australia this difficulty had been smaller than had been expected, proves on analysis of the reasons as given by H. de R. Walker to be largely the result of abandoning essential elements of the system. Walker says that Ministries in Australia are disinclined to resign except upon a direct vote of want of

confidence<sup>1</sup> They look with equanimity on the defeat, whether due to the Opposition or to the defection of some of their own followers, of cardinal principles even in their more important measures. When the Australian tariff was before the House of Representatives, the Ministry repeatedly failed to carry rates of duty to which it had declared that it attached great importance, and it could accept the financial suggestions of the Senate with no smaller sacrifice of dignity Likewise in Switzerland, where a member of the Federal Council has the right to make proposals and speak in either branch of the Assembly, an adverse vote is not supposed to have any relation to his further usefulness and he need not resign. But can that be said to be really responsible government?

Ministerial responsibility assumes that the Executive can resign at pleasure, or the legislative assembly be dissolved. With us custom would almost preclude an Executive from resigning and an appeal to the country by a new election is wholly out of the range of our habits. In 1851 New York watched with interest (and perhaps with amusement) an imitation of the English practice of an appeal to the country. It being apparent that the bill for the enlargement of the Erie Canal, which had already passed the House, would also pass the Senate, twelve of the fifteen Democratic Senators resigned their seats. One other announced his intention to resign should the bill be pressed. In that event there would be but nineteen Senators remaining, and the Constitution required twenty for a quorum of the Senate. When the bill came up for a third reading, there were seventeen votes for and two against, and as less than a quorum was recorded, the bill was laid on the table and the Senate voted to adjourn *sine die*. The Whig members issued a long address denouncing those who had resigned as wilfully violating the Constitution they had sworn to support. The Democrats were not behind in formal denunciation. The Governor called a special session. All but one of the men who resigned were candidates for re-election. The twelve places were filled by five men who favored and seven who opposed the disputed bill, which was promptly passed. The episode did not arouse the approval necessary to encourage its repetition.

The talk of getting responsibility under any imperfect copy of the British Cabinet system, by any program retaining

<sup>1</sup> *Second Chambers in Practice*, 29

definite terms of office, is absurd. Take, for instance, the budget proposal. "We want to hold the executive responsible for every item of expenditure," it is said. But suppose 99 per cent blame him bitterly for some one outlay. What are they going to do about it? Defeat him for re-election? Or suppose their admiration of some other act of his has more than counterbalanced their disapproval of that in question, and so they give him another term. Where is the "responsibility" then? Or suppose he is not a candidate for re-election — a President debarred by the third-term antipathy, a Governor anxious to resume his law practice.

If it be said that judgment will be passed at the polls by the balance of popular debit and credit marks, and that as a verdict based on a specific instance is impossible, it may be left out of account and yet the fact of a balance of items will help, the benefit is visionary indeed. Nothing appears in such a procedure to show that responsibility will have been usefully centered, if centered at all.

Hannis Taylor has urged a modified Cabinet system for Congress. "Under the committee system as now organized," he says, "the several great committees control in turn, under the modified system proposed the Cabinet would simply have its turn. The proposed act should limit the initiative of the Cabinet to the few great subjects of a purely national character which should be formulated before Congress meets, and which should be promptly presented for legislative action as soon as the session begins. In this way a natural division of labor would be brought about under which the drafting and advocating of only a few vitally important acts would pass to the Cabinet, while the Houses themselves would still reserve for their committees the initiative as to the great mass of the business to be disposed of. Thus the committee system would only be modified to a limited extent by the transfer to the Cabinet of the duty of formulating and advocating the few great national measures to which the dominant party stands pledged."<sup>1</sup>

This is virtually an extension of the executive budget idea to a few other important topics, presumably those that the President would as "policies" advance in his messages. It might work well with the executive and legislative branches controlled by the same political party, but would surely be em-

<sup>1</sup> "The House of Representatives," *No Am Review*, August, 1894.

barrassed if not made useless by the opposite condition. The plan contemplates that Cabinet officers shall have seats and the right to debate, but not to vote. One result to be feared is that the Cabinet members not in sympathy with the party majority in Congress, would devote themselves mainly to manufacturing political capital.

A simpler proposal, looking toward harmony by persuasion rather than compulsion, is that Cabinet officers shall be chosen from the membership of Congress. It has various merits. The members selected would surely be men well known by their associates, and thereby assured in advance of the influence that springs from acquaintance and friendship. Almost certainly they would be esteemed as worthy of respect and confidence. Their familiarity with legislative processes and with the temper of the bodies with which they must deal would save them from much of wasted endeavor, and through better understanding, with less of friction, would make satisfactory results more probable. In most cases the member selected to take charge of a Department would have been a member of the Senate or House committee concerned with its affairs, and would bring to his task the advantage of years of acquaintance with its problems.

The Great War led to one Parliamentary episode that suggests a possible avenue of development. On the 2nd of June, 1916, Lord Kitchener held a conference with such members of the House of Commons as chose to attend in one of the large committee rooms, about two hundred coming. It appears to have been a useful experiment. In an address Kitchener helpfully explained the situation and then freely answered questions. If an American Cabinet officer or administrative official should desire to expound a policy or program to legislators, nothing save novelty would hinder him from inviting them to the same sort of conference.

#### FUNDAMENTAL WEAKNESSES

There are fundamental weaknesses in the Cabinet idea that are not to be ignored. Originally Cabinets were advisory bodies, each member being theoretically qualified to inform the Chief Executive about the affairs within the scope of his department. That the members should advise each other and by interchange of views form a compact "administration," was a development not altogether logical. Is there any reason to suppose that an

expert in one field will know much about another? On the contrary, is it not true that the more a man specializes, the less his general usefulness? The more efficient the head of an administrative department, the less likely he is to counsel helpfully with the heads of other departments. Therefore in selecting a Cabinet, a President must choose between administrative efficiency and political utility, by which of course I mean "political" in its broadest sense. The result is that most Cabinet appointments are made without regard to administrative fitness. The Secretary of State has rarely had any diplomatic training. Ignorance of military or naval science seems almost a qualification for appointment as Secretary of War or the Navy. Usually the Postmaster General is a business man, but seldom does he know more of postal affairs than any other citizen. The Attorney General is almost invariably a good lawyer, but rarely a great lawyer. The Secretary of Agriculture is a farmer, but not necessarily one deeply versed in modern scientific farming.

It is this condition that makes it exceedingly doubtful whether the Cabinet idea is applicable to State government. In national affairs the political predominates, in State affairs, the administrative. For efficient State administration it is most desirable that every department head shall be an expert and that his tenure of office shall be reasonably long. The Cabinet system does not encourage this.

Advocates of Cabinets lay much stress on the need of co-ordinating administration. Seeing the effectiveness of co-ordination in the work of great business corporations, they jump to the conclusion that it is just as desirable in the conduct of a government. They forget an essential difference between government and business. The corporation lives for one specific purpose — the making of profit in a single field of endeavor. The field of government, on the contrary, is bounded only by the limits of human happiness. It seeks no profits measured by dollars and cents. Its hundred lines of activity cross each other at few points. Success in one direction rarely bears on success in another. Only in the activities of the sub-divisions, the municipalities and counties, do we approach the conditions of a business corporation. There it may be well to provide for co-ordination by the Commission or City Manager plan. The need of it in State administration is far less apparent, and for the nation it hardly exists at all.

If, however, it is to be sought in State government, there is no hope of finding it in the Cabinets of elected officials that are sometimes suggested, and for which indeed a few constitutional provisions have been made. A Cabinet made up, say, of a Secretary of State, Attorney General, Auditor, or any other small group of designated officials, all elected by people or Legislature, will be fore-doomed to uselessness. It will have not a single element of hope. There will be neither unity nor utility in its advice to the Executive. And were it to advise the Legislature through permission or command to attend the sessions of that body, it would be scorned.

In only one particular does the idea of admitting heads of departments to lawmaking bodies appeal to me, and that is in the matter of information. It might at times be helpful for Legislature or Congress to have the warrant of custom for the exercise of the power of sending for the head of a department in order to hear his statement or to ask him questions. Most of the desirable results, however, are even now accomplished by having the information given to committees. In Massachusetts at any rate, and probably in the other States, it is a normal procedure for committees to hear and interrogate heads of departments. In Washington a decade ago it was the custom for nearly every Cabinet official to appear before the House Committee on Appropriations with regard to his estimates. For some reason the custom has been followed irregularly of late, though not because of the attitude or desire of the Committee, for it always communicates with the Secretary of a Department when his estimates are under consideration and he may come if he wishes or may send his experts or under-officials to speak in behalf of the appropriation desired.

Perhaps recent Secretaries have appreciated their limitations. Anyhow such a surmise might follow reading what Chairman James F. Good said in the course of hearings on the Budget reform in 1919: "The thing that amazed me in the consideration of these estimates was the fact that for a number of years when the Cabinet members did come before the committee they knew very little about the estimates. The ignorance displayed by some Cabinet officers was surprising to the members of the committees before whom they have appeared with regard to the details of the estimates and with regard to questions of policy. If we should amend the law so as to permit them to

come on the floor of the House, I think it would have one beneficial effect, and only one, and that would be to explode some of the false standing that certain public officials have in the public mind."

Justice to our Cabinet officers, however, calls for recognition of the fact that save in the case of the Attorney General and perhaps the Secretary of Agriculture, custom does not call for selection with especial reference to qualifications for the administrative work involved. Cabinet officers are not expected to have had the occupational training that would promise fitness to cope with detail. Indeed it is the presumption that they will rely upon subordinates.

This is not the case with State officials. They are presumed to be experts, and it ought everywhere to be the invariable practice for committees to consult with them regularly. The committee room is much the better place for this, since it has the great advantage of permitting informal discussion in the conversational manner so well calculated to illumine all sides of a question. When a bellicose atmosphere can be avoided, the results are adequate.

If critics would recognize that the committee system has become an integral part of our frame of government and is not in the least likely to be supplanted, if critics were willing to make the best of it, they could be of much more service by helping to co-ordinate committees with Departments, than by vainly arguing for the co-ordination of departments with each other. A systematic organization of Departments, Bureaus, and Commissions, such as was contemplated by the New York Constitutional Convention of 1915, and in Massachusetts accomplished as a result of the Convention of 1918, if followed by a corresponding organization of legislative committees, may bring real gain. With every administrative activity under the oversight of some one legislative committee, advantageous fixing of responsibility can be secured.

It will doubtless be replied that administrative divisions should be responsible only to an executive head, as in a business corporation, and through him to the Board of Directors and so to the stockholders. Were a Legislature a Board of Directors and nothing more, there would be much force in this, but such is not in fact the case. Our representative bodies, from causes interwoven in the history of our political institutions through



centuries of development, are accustomed to appropriate the money of the people, not in lump sums to be allotted at the will of a single Executive, but to agencies and for purposes minutely specified, with detail reaching even to the salaries each official shall receive. Unwritten law, as fundamental and compelling as if it were phrased in constitutional form, is supposed to authorize and in some measure to require those who appropriate the money, to see that it is properly spent. To this end they are expected to deal directly with the agencies concerned, and not as in a business corporation through the Chief Executive

As will be set forth more fully later, this uncharted function of legislative assemblies furnishes one of the most vexatious problems in political science. It is not a normal, natural function of a body chosen ostensibly to make laws. For the scope and limit of this function you must look wholly to precedent and custom. Therefore wide variations in practice appear. At one extreme is the Parliament of England, accurately described by Disraeli as the great inquest of the nation. No other assembly in the world so closely scrutinizes the administration of public affairs. On the other hand Congress sadly neglects the duty, if it be a duty. Congress came but slowly to the conception that it was to concern itself with the details of administration. In 1818 the House of Representatives appointed a committee to inquire whether any clerks or other officers in any of the Departments had conducted themselves improperly in the performance of their official duties. When it was contended that the resolution assumed a power over executive departments belonging to the President alone, and would thus impair executive responsibility, it was answered that the House was like a grand jury to the nation and that it was the duty of the House to inquire into the conduct of public offices. This theory was accepted and from time to time each House has made investigations into the various branches of the public service, but spasmodically, unscientifically, too often from ulterior motives of a partisan nature. Committees on expenditures in the various Departments, one for each, have rarely met and more rarely have accomplished anything useful. Only as the inquiries of appropriating committees about the need of further appropriations have disclosed malfeasance and waste has there been anything in the nature of effective superintendence. Few if any of

the State Legislatures handle the matter any better. It is a governmental function that we greatly neglect.

Whether or not the wisest course would be to take the work out of legislative bodies altogether and entrust it to special censorious agencies — however desirable it might be that legislators should not concern themselves with the minutiae of administration — they are not likely in our time to forego their petty occupations or in matters really important to abandon their control of the executive branch. We are still going to have what in the last analysis will be found to be government by committees. That government ought to be recognized and ought to be systemized.

For an illustration of the problems that arise, take the question of how the legislative branch shall get information from the executive branch. Friction is liable to develop whenever a committee or an individual legislator consults directly some under-official instead of approaching him through the head of the department. Mr. Taft was criticized because of an order in the first year of his administration prohibiting any subordinate from responding to requests for information from any member of Congress except as authorized by the head of the department. The criticism seems to me to have been unwarranted, particularly as far as it was based on this reason given in the "Outlook" of April 2, 1910: "The business of the public ought to be publicly conducted. The perils from too great secrecy are far greater than the perils from too great publicity." Was this not beside the mark? It is not a matter of publicity, but a matter of discipline. Of course ordinarily no harm comes from the talk of a subordinate, but it is the superior who is responsible, and on any matter of moment, clearly he ought to be consulted. Once in a while it becomes necessary to bring this home to subordinates who have forgotten their true relation to their superiors or who have shown themselves incapable of discrimination.

The relations between Departments and the Legislature came under discussion in Massachusetts in 1897. Certain public-spirited citizens wishing to improve the administration of the State charities, issued a circular containing statements believed to be misleading by a subordinate of the State Board of Lunacy and Charity. On his own authority he summoned to Boston five employees of the Board and gave them instructions to see legislators from their parts of the State, for the purpose

of counteracting the statements in question. Complaint was made to the Governor and he asked the Board to investigate, saying in one of his communications that while he fully recognized the right and duty of heads of departments and other officials to present their views to committees when invited, it had seemed to him that after the committees had reported, this right and duty ceased. The Board held in its findings that "it is the duty of every elective officer of the State government, and of every Commission, to seek proper opportunity to inform, not only the Legislature, but the Chief Executive, concerning any pending measure and the evils or advantages which may follow to the Commonwealth from it in all cases of proposed legislation." Six other broad statements of principle were laid down. It was averred that elected officers and Commissioners have all the rights of private citizens in expressing their views; that employees of the State should during official hours give their services wholly to the purpose for which they are paid, unless the law clearly permits the contrary, that no paid official should appear before a legislative committee, except when duly summoned, unless in the discharge of official duty, that employees may be summoned by superior officers to appear before a legislative committee, that officials have no right to direct their subordinates to solicit the votes of legislators.

The opinion of the Board to the effect that it is the duty of administrative officials to take the positive rather than the negative attitude toward pending legislation, deserves especial notice. It is a most damaging defect of the spirit of our governments, State and Federal, that our administrative officials so generally feel their duty to end with carrying out orders. It is said that Judge Thomas Russell, when head of the Massachusetts Railroad Commission, complained because the legislative Committee on Railroads had refrained from summoning him to appear before them when an important bill was under consideration. If all department heads could be induced to take such an attitude, great gain would be made. What would a business man say of an expert in his employ who felt constrained never to make a suggestion for the improvement of the business?

The reason for the false position of the experts we hire in our capacity as public employers, is that by the exercise of initiative they have little to gain and much to lose. Contribution of

original ideas rarely holds out to them any hope of increased salary, except through the slow process of promotion. On the other hand self-interest furnishes a strong incentive to them to be colorless, so that they may not attract hostile criticism and invite the risk of losing their positions. The situation can be bettered by making tenure of office more secure and by removing administrative work from the influence of party politics as much as possible. It can never be wholly cured, for the public business can never hold out the rewards that private business offers for originality, inventiveness, and initiative. Much, however, can be accomplished by the development of a public attitude toward public officials that shall have less of fault-finding and more of appreciation.

#### ATTENDANCE AT SESSIONS

The first appearance in American discussions of the idea that Cabinet officers should attend Congress may have been in the remarkable pamphlet where Pelatiah Webster, in February of 1783, set forth the plan of federal government that some enthusiasts believe to have been the inspiration of the Federal Constitution. Webster proposed that the executive power should be vested in a President surrounded by a Cabinet or Council composed of the "great Ministers of state." They were to superintend all the executive departments and appoint all executive officers, who should ever be accountable to and removable for just cause by either the Ministers or Congress. Said he "I do not mean to give these great Ministers of state a negative on Congress, but I mean to oblige Congress to receive their advices before they pass their bills, and that every act shall be void that is not passed with these forms, and I further propose that either house of Congress may, if they please, admit the said Ministers to be present and assist in the debates of the House, but without any right of vote in the decision."

When the first Congress deliberated, the occasional attendance of the Secretaries appears to have been taken as a matter of course. On the 22nd of July, 1789, the Secretary of Foreign Affairs, Thomas Jefferson, "attended, agreeably to order, and made the necessary explanations."<sup>1</sup> In August General Knox, the Secretary of State, delivered at least two messages from the President, with sundry statements and papers. Once he came

<sup>1</sup> *Annals of Congress*, 1st Congress, I, 51

into the Senate Chamber with the President, who "laid before the Senate the following statement of facts," says the record, "with the questions thereto annexed, for their advice and consent."<sup>1</sup>

The act of 1789, organizing the Treasury Department, provided that "the Secretary of the Treasury shall, from time to time, digest and prepare plans for the improvement and management of the revenue and for the support of the public credit." Furthermore he "shall make report and give information to either branch of the legislature, in person or in writing, as may be required, respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office." Alexander Hamilton, the first Secretary of the Treasury, deemed it his right to report on financial matters whenever he pleased, though in fact his famous reports and recommendations were submitted only on request. In January of 1790 he tried in vain to get the consent of the House to read to it his important and intricate report on Public Credit. Prejudice against the presence of cabinet officers was beginning. The jealousies between Hamilton and Jefferson were laying the foundations for partisanship. When in November of 1792 certain members much wanted to hear both Hamilton and Knox relating to St. Clair's disastrous defeat by the Indians, a resolution was introduced to inform the Secretaries of the Treasury and War that the House intended to consider at a specified time the report of the committee, so that the Secretaries might attend and give information. Madison was against the resolution, Fisher Ames and Elbridge Gerry were for it. The House rejected it.

Jefferson wrote to T. M. Randolph, November 16, 1792: "Congress have not yet entered into any important business. An attempt has been made to give further extent to the influence of the Executive over the legislature, by permitting the heads of departments to attend the house and explain their measures *viva voce*. But it was negatived by a majority of 35 to 11 which gives us some hope of an increase of the republican vote."<sup>2</sup> Here is no direct repudiation of the practice at which he had connived three years before, but the wording indicates at least no friendly attitude toward it, rather a sense of satisfaction that the executive influence, in other words the influence

<sup>1</sup> *Annals of Congress*, 1st Congress, I, 66

<sup>2</sup> *Writings of Thomas Jefferson*, P. L. Ford ed., VI, 134

of Hamilton, had met a check. Hamilton throughout his term maintained very close relations with his supporters in Congress, and directed legislative tactics especially with regard to the funding of the national debt and the assumption of the State debts. Remember the delicate negotiations that resulted in placing the capitol on the Potomac in return for support from Virginia members for the measure on assumption of State debts. He wrote to Jay "'Tis not the load of proper official business that alone engrosses me, though this would be enough to occupy any man. 'Tis the extra attention that I am obliged to pay to the course of legislative manoeuvres that alone adds to my burden and perplexity."

Since Washington's administration, the Secretaries have never appeared on the floor of either House in an official capacity, except on occasions of ceremony, so far as I can learn. From time to time this was regretted, but the regret had no tangible results until men experienced in the Congressional affairs of the Union came to draw up the Constitution of the Confederacy. Although preserving the distribution of powers to which they had been accustomed, and forbidding any member of either House to hold any other office, they directed that their Congress might by law grant to the principal officers in each of the executive departments a seat upon the floor of either House with the privilege of speaking. Testimony as to the result is scarce. Dr. F. N. Thorpe, a member of the Pennsylvania Commission on Constitutional Amendment and Revision, said to it in December, 1919: "I believe the only record made of it was by a member from Texas, who tells us very plainly that it was faulty. To use his own language, as I recall it, he said that the executive or the representative of the government, who was the Postmaster General, was torn all to pieces."<sup>1</sup>

Yet there must have been some ground for the belief since prevailing that the idea worked well. Anyhow while it was still in operation its principle appealed to George H. Pendleton, a member of the Federal Congress, whose efforts resulted in favorable reports in the House of 1864-65 and the Senate of 1879-82, looking to the same end. James A. Garfield, afterward President, said in the House January 26, 1865: "Who does not know that the enactment of this law will tend to bring our ablest men into the Cabinet of the republic? Who does not know that,

<sup>1</sup> *Proceedings*, 1, 223

if a man is to be responsible for his executive acts, and also to be able to tell why he proposes new measures, and to comprehend intelligently the whole scope of his duties, weak men will shrink from taking such places? Who does not know that it will call out the best talent of the land, both executive and parliamentary? What is the fact now? I venture to assert, that the mass of our executive information comes from the heads of bureaus, or perhaps from the chief clerks of bureaus, or other subordinates unknown to the legislative body. I would have it that, when these men bring information before us, they shall themselves be possessed of the last items of that information, so that they can explain them as fully as the chairman of the Committee of Ways and Means ever explains his measures when he offers them to the House "

No action was taken on the report of the committee

Mr Pendleton renewed his fight when he came to be a Senator Favorable report was made by a committee consisting of Senators Pendleton, Allison, Voorhees, Blaine, Butler, Ingalls, Platt, and Farley They strongly approved the presence of Cabinet officers on the floor of each House

The first section of the proposed bill provided for voluntary attendance, to take part in debate, the second, for compulsory attendance, to give information No question was to be called up unless after three days notice to the Secretaries, and the answers were limited to the specific points of the question, in order that accuracy might be attained <sup>1</sup> The report said the advantages of the system proposed were so obvious and manifest that the committee felt relieved from a detailed statement of them, and so confined itself chiefly to an examination of the question of constitutionality, but it also met certain criticisms, saying "It has been objected that the effect of this introduction of the heads of departments upon the floor would be largely to increase the influence of the Executive on legislation. Your committee does not share this apprehension. The information given to Congress would doubtless be more pertinent and exact, the recommendations would perhaps be presented with greater effect, but on the other hand, the members of Congress would also be put on the alert to see that the influence is in proportion only to the value of the information and the suggestions; and the public would be enabled to determine whether the influence is

<sup>1</sup> Senate Report 537, 3d Sess, 46th Cong, 1880-81

exerted by persuasion or argument. No one who has occupied a seat on the floor of either House, no one of those who, year after year, so industriously and faithfully and correctly report the proceedings of the Houses, no frequenter of the lobby or gallery, can have failed to discern the influence exerted upon legislation by the visits of the heads of departments to the floors of Congress and the visits of the members of Congress to the offices in the departments. It is not necessary to say that the influence is dishonest or corrupt, but it is illegitimate, it is exercised in secret by means that are not public — by means which an honest public opinion cannot accurately discover, and over which it can therefore exercise no just control. The open information and argument provided by the bill may not supplant these secret methods, but they will enable a discriminating public judgment to determine whether they are sufficient to exercise the influence which is actually exerted, and thus disarm them."

Also "If it should appear by actual experience that the heads of departments in fact have not time to perform the additional duty imposed on them by this bill, the force in their offices should be increased, or the duties devolving on them personally should be diminished. An under-secretary should be appointed to whom could be confided that routine of administration which requires only order and accuracy. Thus they would have abundance of time for their duties under this bill. Indeed, your committee believes that the public interest would be subserved if the Secretaries were relieved of the harassing cares of distributing clerkships and closely supervising the mere machinery of the departments."

In spite of the standing and influence of the Senators who signed the Pendleton report, their advice fell on deaf ears. From this the man inexperienced in the mental processes of legislative bodies might hastily assume that Congress was stupidly tenacious of bad habits. The wiser inference would be that the habits were not adjudged bad by the majority of those familiar with the conditions. When a group of men as strong as the Pendleton committee could make no headway, the chances are that there was much to be said on the other side of the question.

A few years later Woodrow Wilson, writing as an observer, took ground on this question quite consistent with his preference for the English system. He argued that to integrate the whole system of government there must be some common meeting-



ground of public consultation between the Executive and the Houses. "That can be accomplished," he said, "only by the admission to Congress, in whatever capacity — whether simply to answer proper questions and to engage in debate, or with the full privileges of membership — of official representatives of the Executive who understand and are interested and able to defend the administration" <sup>1</sup> It is to be noticed that when Mr. Wilson came to be President, he did not make such a reform prominent in his program of policies. Very likely other matters of more immediate importance engrossed his attention before the Great War, and of course after that broke out all questions of domestic re-organization had to be laid aside. Yet the lack of any serious attempt on his part to introduce his Secretaries into Congress may warrant the surmise that perhaps he did not deem it so wholly desirable when he came into personal contact with the situation.

Such a surmise would have more of probability were it not for the fact that his predecessor, Mr. Taft, left the Presidency with strong conviction in favor of the change, which he repeatedly voiced. For instance, while still President, he said to the Lotus Club of New York: "I doubt not that the presence of able Cabinet officers on the floor of each House would give greater harmony of plan for the conduct of public business in both Houses, and would secure much more valuable legislation in accordance with party plans than we have now. On the other hand, the system would enable Congress to come closer to the Executive, and more effectively obtain information as to each act and compel a disclosure of the reasons justifying it, immediately at the time of the act, and keep the public more quickly advised by the direct questions of hostile critics which must be answered, of the progress of business under Executive auspices. . . . It would necessitate the appointing to the Cabinet of men used to debate and to defend their position, and it would offer an opportunity for the public to judge of the Executive and his administration much more justly and much more quickly than under our present system" <sup>2</sup>

When Representative Clyde Kelly of Pennsylvania became

<sup>1</sup> "Responsible Government under the Constitution," *Atlantic Monthly*, April, 1886

<sup>2</sup> Quoted by Perry Belmont, "Cabinet Officers in Congress," *No. Am. Review*, January, 1913

the champion of the proposal, in the course of his campaign for it he asked the views of Mr. Hoover, then a Cabinet member. In replying, June 23, 1922, Mr. Hoover said he believed this one of the most constructive steps that could be taken in furthering the development of our political machinery. "There are in my mind overwhelming arguments that can be introduced in favor of this change in our traditions. I do not believe that any fundamental criticism can be directed against it except by those who would deliberately exaggerate it as an attempt to establish a form of parliamentary government. Anyone who understands the basis of such European organization will at once recognize that the step you propose has no relation whatever to this form of government." Like Mr. Wilson he did not press these views when he became President, but he too had graver questions to handle, engrossing questions leaving no time for problems that could be postponed.

Inasmuch as Mr. Taft expressed his opinion in this matter to a Committee of the New York Constitutional Convention in 1915, it is to be presumed that he thought the principle the same whether applied to Congress or a State Legislature. Its desirability in State government has, however, not been so widely urged as for the national government. One of the few Governors who have advocated it was John D. Long of Massachusetts. In his annual message, January 6, 1881, speaking of the elective heads of departments, he said. "I recommend that you give them seats in the Legislature, with the right to speak upon questions affecting their department, but of course without the right to vote." A year later he renewed the suggestion, saying: "I still am convinced of the advantage and economy of an executive council, composed of the elective heads of departments, rather than as now constituted, and of giving them seats in the Legislature with no vote, but with the right to speak upon questions affecting their departments."

#### FROM THE LEGISLATIVE SIDE

It is the executive point of view that has chiefly been presented to the public. Although as the Pendleton report shows, the legislative reasoning does not always lead to opposite conclusions, yet those would probably be found to be the more common among men who have had the experience of lawmakers. For a vigorous instance thereof, take the views of Henry Cabot

Lodge, who after service in the Massachusetts Legislature, was long in the national House and Senate "The suggestion that we should better our system by borrowing something from the English," he said, "is the product of the merely imitative mind which is unable to see that such borrowing at this stage is impossible, and would be also both impracticable and undesirable even if it were possible. For example, there are some most excellent people who think that our political salvation is bound up in having Cabinet officers or representatives of the Executive on the floor of Congress. They utterly fail to see that in order to do that in any way worth doing we must abandon the American system of three co-ordinate and distinct departments, and place in the hands of Congress in addition to the legislative power the executive power also, to be exercised by a select committee or Ministry. It makes no difference whether this is a better system than our own or not. The American people rejected it at the outset, do not believe in it now, and are not going to change the Constitution of the United States in that direction" <sup>1</sup>

Another conclusion of like tenor, reached by one who also added to experience the reflections of the scholar, and who looked through the problem to the principle involved, was that of John Randolph Tucker. "To admit the Cabinet to a seat on the floor of either House," he said, "not as members, but to be required to answer all of the inquiries of members of either body, and to divulge the motives of executive action in the various departments, would not only bring to bear upon the action of the House the influence of the presence of executive officers who were neither members of it nor responsible to it, but on the other hand would expose the executive policy of the President to improper inquisition by either House through inquiry addressed to his subordinate agents in the Cabinet. The independence of the executive, secured by the Constitution, would thus be impaired or overthrown, and the insidious presence of executive power and influence might operate disastrously though in subtle forms upon the independence of the representatives of the people" <sup>2</sup>

Coming to a more practical aspect of the question, read what was said to a committee of the New York Constitutional Convention of 1915 by a Congressman of exceptional capacity, John

<sup>1</sup> "Parliamentary Minorities," *Historical and Political Essays*, 189

<sup>2</sup> *The Constitution of the United States*, I, 445

J. Fitzgerald, who as Chairman of the Committee on Appropriations spoke from important experience. "This is what would happen if we gave the members of the Cabinet a seat in the House of Representatives. The Secretary of War to-day, for instance, would prepare an elaborate speech in favor of what he believed to be desirable reforms in the Army. And he would have the stage all set and the speech on the wires and set up on the boards throughout the country. And he would go to the House of Representatives and make a speech advocating his side of the question that would get a publicity that would be unique, and nobody who answered him would be given any attention whatever, and it would be the most effective way for Executive coercion and domination that could be urged in the legislature of the country. Where the Cabinet members have a seat in the legislative body, you see their position is so different. They are like the chairman of a committee who had a bill. When the House of Commons resolves itself into the committee on supply and they reach the estimate of the War Department, the Secretary of War is in charge, associated with the Chancellor of the Exchequer of that portion of the budget, and then he is gulled and hammered, and if a proposal is made to strike out a certain grant, he must defend it, and if it is an important matter and he is defeated, he submits his resignation, or it might be sufficiently important to compel the whole government to go out; but just to give these members of the Cabinet a right to come in and lecture and browbeat and overawe and develop public opinion so as to coerce the Legislature, we have enough of that already and we would not get anything effective."<sup>1</sup>

And farther on. "Of course, if the object is to make it certain that a head of a department will get all the money he thinks he ought to have, that will help him very materially. But that is not the evil that every one complains of. In spite of all the supposed handicaps under which the department labors, our expenditures every one concedes are excessive, greater than they should be. Now, if you permit the head of the department in addition to all the other ways he has of influencing the members of the committees in Congress to come in on the floor of the House under conditions in which he is able to create a public opinion, whether correct or incorrect, in order to do what? In order to defeat the recommendations of a Committee that is

<sup>1</sup> *N.Y. Conv Doc* No 15, p 47

trying to protect the public treasury That is the only thing. That is what it is No one suggests that it is necessary in Congress for the head of the department to come in in order to get the things the Committee recommends, but it is to help him to get the things the Committee refuses to recommend " <sup>1</sup>

Since Mr Fitzgerald thus testified, the situation as far as appropriations are concerned has been much changed by the adoption of budget systems That of the Federal government requires the heads of all Departments and independent offices to submit their estimates to the Director of the Budget and these cannot go to Congress until he has approved their details. Although there is no formal requirement of the sort in the matter of revenue bills, the practice is for the Treasury Department to formulate them and in the course of their consideration by committees of House and Senate, the advice of the experts of the Department carry great weight These considerations led James M Beck to say, in "Our Wonderland of Bureaucracy" (p 7) "My own experience in Congress leads me to doubt that its usefulness would be aided if the ten members of the President's Cabinet were necessarily members of the Congress. It is true that they could, on the floor of either House, defend themselves against unjust attacks, and might influence votes, then to be taken, upon measures of public policy But the same objective is reasonably attained by the ability of the Executive and the Cabinet at all times to have close and immediate contact with the Congress, either by formal communications, which are printed upon its records, or by appearing before the Committees and explaining the views of their Departments."

I agree with Mr Beck's conclusion, after like observation and experience on the legislative side, but I would add another reason Along with the budget has come most useful and influential development of the legislative drafting service. Its competent lawyers, placed by custom beyond the reach of the spoils system and so given the length of time necessary to become experts, now share in shaping all the important measures Of course they do not advise in matters of policy, but they do prevent most of the blunders in point of technique that previously gave so much ammunition to those who argued for the right of a Department head to attend sessions in order to prevent follies in details. There still remains the possibility of unwise or stupid amend-

<sup>1</sup> *N Y. Conv Doc* No 15, p 51

ments on the floor, but these can usually be corrected in the other branch or the conference committee, with veto as the last resort in case of anything serious. The system is now so nearly fool-proof that argument on this score is hardly worth while.

Mr Beck's conclusion is the more significant because there is no man in all the land more jealous of constitutional prerogatives than he. Were there any ground for objection to the presence of Cabinet members as violating the separation of powers intended by the Constitution, surely he would have discovered it. There is no reason to suppose that the framers of the Constitution meant to separate the three departments of government by impenetrable walls. From the start there was intercommunication. No sensible man would now argue that Secretaries or Bureau heads ought not to appear before committees. Those groups are part and parcel of the lawmaking branch, legislatures in miniature. It would be finicky to say they might not get information and advice from anybody in the executive branch. No constitutional reason appears for permitting it to committees and forbidding it for the bodies they represent.

Minor matters present another aspect of the problem. Few advocates of the attendance of Cabinet members would go so far as to require it to be continuous as in England, where it is expected that there will always be somebody of the Government present, even though of late occasionally that has not been the case. For us to make such requirement would be a sad waste of administrative time. We escape it by reliance on committees, yet not without help from the executive branch. Bills that reach the floor have either been submitted to the Departments concerned or been subject to their examination on their own initiative, and it is rare that committees have not in one way or another been informed of objections. Generally attendance of Cabinet members in the House would in these matters develop nothing but difference in judgment, and if the executive view prevailed, then the executive branch would be the real law-maker, which is not contemplated under our system.

To require the constant attendance of officials in Congress by statute or custom would add grievously to their burdens and interfere seriously with the performance of their administrative duties, and the same thing would be true of attendance by State officials in their Legislatures. Yet were they not constantly on

hand, only part of the gain expected from their attendance could be secured. In England through many years the Ministers had to breathe the poor air of the House of Commons nine hours nearly every night of the session. Many suffered in health; some broke down under the strain. It was a lamentable waste of highest-grade vitality, precious to the nation, and all the worse because of such little profit to anybody. Lately the custom has been less binding, if we may judge from growing complaint of absence of Ministers from the House.

If just when Parliament has made a start toward discarding the practice, we take it up, we shall find it running against technical difficulties that will seriously affect its usefulness unless we radically revise our methods. These difficulties spring from the irregularities of legislative programs. In Parliament the control of the daily program is largely in the hands of the Ministers. Cabinet members or State officers would have nothing to say about the calendar. Often the greater part of the members of Congress themselves do not know what is coming up the next day and only once in a while does anybody have much warning as to when a measure in which he is particularly interested will be discussed. In the State Legislatures that handle bills consecutively in the order in which they have been put on the calendar, there are all the uncertainties of a trial-list in court, where nobody knows how fast or slow the progress may be. This would result in a wretched waste of the time of our department heads or else constant uncertainty as to their presence when wanted.

Of actual experience with the presence of executive officials in our legislative assemblies we have had little, but such experiments as have been tried, have not been encouraging. The charter of New York City adopted in 1873 provided that the heads of Departments might sit and debate, but without vote, in the Common Council or the Board of Aldermen. Francis Lynde Stetson told the Academy of Political Science, November 19, 1914, that the right was without the slightest effect, largely because no consequence attached to the flouting of the advice of the head of a Department and no responsibility attached upon him for giving bad advice.

It is not to be forgotten that responsibility is the very essence of the English system. In England the ministry that is not obeyed, resigns or goes to the people. A member of the Cabinet

who speaks in Parliament is its leader, not its servant. That very wise Englishman, Walter Bagehot, pointed out what would happen if the head of a department sat in the House simply in his capacity of department head. "A great popular assembly," he accurately observes, "has a corporate character; it has its own privileges, prejudices and notions, and one of these notions is that its own members — the persons it sees every day, whose qualities it knows, whose minds it can test — are those whom it can most trust. A clerk speaking from without would be an unfamiliar object, he would be an outsider, he would speak under suspicion, he would speak without dignity; very often he would speak as a victim — all the bores of the House would be upon him, he would be put under examination, he would have to answer interrogatories, he would be put through the figures and cross-questioned in detail, the whole effect of what he would say would be lost in *quaestunculae* and hidden in a conversational detritus." <sup>1</sup>

And further. "Again, such a person would rarely speak with great ability. He would speak as a scribe, his habits must have been formed in the quiet of an office, he is used to red-tape, placidity, and the respect of subordinates. Such a person will hardly ever be able to stand the hurly-burly of a public assembly; he will lose his head — he will say what he should not; he will get hot and red, he will feel he is a sort of culprit. After being used to the flattering deference of deferential subordinates, he will be pestered by fuss and confounded by invective. He will hate the House as naturally as the House does not like him, he will be an incompetent speaker addressing a hostile audience" <sup>2</sup>

The force of this must appeal to anyone who has watched executive officials before legislative committees. I have there seen them browbeaten shamefully by little legislators, swollen with unaccustomed power. On each side there is instinctive hostility. The committee member suspects selfish purpose, is unwilling to assume sincerity or disinterested motive. The official thinks he will not get fair play, and smarts under the insinuations and implications of the questioner. Rarely is he at his best. One I know whose usefulness as a public servant was in the end ruined because of the unfavorable impression he made

<sup>1</sup> *The English Constitution*, ch. vii.

<sup>2</sup> *Ibid.*, ch. vii



on legislative committees Yet he was said to be an expert in his specialty.

It is not enough recognized that in some respects our committee system is the correlative of the English cabinet system, but with important differences Parliament has no such committees as ours It has one committee, known as the Cabinet or the Government, which in effect makes the laws. Our committees in effect make the laws In each case the Houses amend, ratify, reject It is a function of our committees to perfect the bills they are to report and to guard them as far as possible against unwise amendment on the floor of either House The members of the committees of Congress are specialists in respect of the subjects they handle Almost always some of them have had long acquaintance with these subjects, longer acquaintance than the Secretaries in the Cabinet have had Ours may or may not be the better system, but on the whole it has worked well. It conforms to the spirit of our institutions and it is deeply rooted It will not be quickly replaced or easily modified

Before leaving the subject, let me point out a broad aspect of the matter not often considered The fundamental difference between the British and American systems is one of spirit The English form of government seeks harmony by combining the legislative and executive branches Our form welcomes some degree of conflict England proceeds by co-operation, the United States by co-ordination In England the Cabinet (which is the Executive) and the majority of the House of Commons must be of one mind, or else dissolution In the United States we desire and expect that officials and legislators shall reach independent conclusions, to be reconciled by conference and compromise as far as may be, with the judgment of the legislators to prevail in case of final disagreement

We reap the benefits of hostility Always the legislative and executive branches are arrayed against each other. Even when the majority of Congress or the Legislature is of the same political faith with the President or Governor, and personal relations are of the most amicable, instinctively official action will be at least colored by rivalry or by antagonism in some other form, however mild and gentle Critics err in thinking this unfortunate, undesirable On the contrary it is the cardinal merit of our system We get the good of two points of view When controversy results, it does no abiding harm Everything that

moves makes friction. Only by the conflict of ideas do we reach wise ends in government. The more of conflict, the better.

In view of this it might be plausibly urged that the attendance of executive officials in legislative chambers would serve a useful purpose by stimulating controversy. So it would, and it must be admitted that the gain by riveting public attention on legislative issues would be useful. The difficulty is that the controversy would surely be partisan, the critics would be of the minority; doubting members of the majority would be constrained to silence. This we largely avoid by confining the cross-examination to the committee room, where the atmosphere is less partisan and there is little chance for either witness or questioners to bid for popular approval.

To conclude, measured by contentment, the English system as a whole is the worse off. It is the target for criticism more plentiful and more severe than the separation of powers gets in the United States. In my judgment the English criticism of English methods is deserved. I cannot understand how any man familiar with Congress can peruse such a volume as the "Minutes of the Select Committee on House of Commons Procedure (1914)" and rise from it without the conviction that the system of ministerial responsibility is far inferior to the American system in point of legislative efficiency. With us the legislator legislates. However imperfect the process, it is better than that of habitual acquiescence with occasional revolt. By the use of committees free to exercise independent judgment, we energize large numbers of men who in Parliament would be idle and helpless. We enlist individual responsibility. Thus we do actually bring to bear upon the problems of government many minds, and whether each contributes little or much, the sum total of wisdom thus amassed is worth the while. Surely it better reflects the will of the citizens who make up the republic.

## CHAPTER XII

### THE BUDGET

ORIGINALLY a grant of money to an English King was not a law, either in substance or in form. The grant was one of the two elements of a bargain; the other element was some sort of concession by the King in return for the grant. At the outset the grant took the form of an indenture, did not require any formal assent from the King, and was entered on the roll of Parliament simply as a record. Not until the time of Henry VIII did it take shape as a statute, with enacting words. Toward the end of the reign of that monarch, a reference to him was included, which appears to have established the principle that a reference to the legislative authority of the King should appear somewhere in the bill. With the renaissance of Parliament after the Tudors came the contention that it was a fundamental privilege of the Commons to have all supplies rise and begin from them. Over against this the Stuarts set the doctrine that the right to establish and levy taxes rested with the King alone. James I brought that view to the front, but it was his son Charles I who pressed the doctrine with pertinacity and owed to it the loss of his head. The attempt of Charles to impose taxes without the consent of the people brought on the Commonwealth. In 1689 the matter was clinched by the paragraph in the Bill of Rights — "That levying money for or to the use of the Crown, by pretence and prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal."

The spokesmen of the people in the days of James I and his son stoutly urged it to be already an ancient maxim that the Commons alone could empower the King to levy the people's money. With historical accuracy they asserted the right to impose conditions before making the grant. So they established beyond further question the doctrine that the redress of grievances should precede supply, a doctrine ever since held to be one of the bulwarks of English liberties.

This has been no merely academic doctrine remotely and indirectly influencing affairs, but has had practical effect of much

consequence in shaping parliamentary institutions To this day in England the motion to go into Committee of Supply gives the opportunity for that comprehensive criticism of the policy or acts of the Government which might be called the hub, the center, the focus of English politics. On this occasion usage suspends the rules of relevancy and the attack becomes general. To be sure, since 1882 the opportunity has been curtailed by rules of procedure made necessary in order to save the time of the House, but the principle survives, with enough application to give it security. In Canada, too, it gets practical recognition in the custom of holding final action on supply bills until the very last thing, on the theory that every citizen should have all the opportunity possible to petition the Crown for redress or relief before the grant of supply.

Historically speaking, it is not, however, the case that redress of grievances necessarily means legislation The grievances of our English forefathers related to the conduct of affairs, the waging of burdensome wars, the granting of oppressive monopolies, the misbehavior of royal favorites, the waste of Crown property, the abuse of prerogatives If in the early days the promise to approve laws was made a condition precedent to the grant of supplies, that has not been so since the Revolution of 1688 American champions of the privileges of lower branches cannot fortify their demands with proof that in Parliament itself it has in the course of the last two centuries been successfully maintained that the Commons may attach general legislation to bills of supply in order to coerce acceptance.

Furthermore there is no such thing in American theory as a grant of supply. Our Executives are not properly looked upon as independent entities, with whom bargains are to be made, even if the exigencies of politics do now and then produce that sort of thing Almost never have Executives any occasion to press personal needs such as those of the colonial Governors in matters of salary, or those of the earlier English monarchs always wanting money for the royal pleasures Let it not be forgotten that many, many years passed after the Norman Conquest before Englishmen shook off the feeling that their Kings were foreigners, interlopers, forced on them by the fortunes of war Only with William of Orange came the clear conception that the crown was worn by a servant, not a master, of the people The word "grant" has persisted, but it is meaningless now,

and the occasion for coercing the man on the throne has long since gone

Another survival is the pretence that the King asks. It may be seen in the pithy description of the English system by Sir Stafford Northcote "The Crown demands, the Commons grant, and the Lords consent" Long ago, however, the monarch ceased to have anything to do with the matter, except for the formal ceremony of the Speech from the Throne upon the opening of Parliament, in which the demand for supply is made. The substance of the speech, the financial program for the year, is the work of the ministry. Nowadays when "the Crown" is spoken of in matters financial, as in all other matters parliamentary, "the Government" is meant, that is, the Cabinet, or in the last analysis the Prime Minister, the autocrat of England for the time being.

In mediæval times, when the cost of government went little beyond the maintenance of the King and his Court, and the expenses of war, it was the King, with or without the help of his close advisers, who determined what amount was needed. As responsible government developed, the advisers took over the function of originating, at first with the co-operation of the King, and then with no regard to him. With William III came the practice of annual grants instead of voting certain revenues for the King's lifetime, and this made necessary the preparation of a proposed schedule of expenditures every year. Incidentally it was this that assured the assembling of Parliament every year.

Thus without design, and therefore it may be said by accident, came about the financial system that now prevails in most of the world except the United States, and that is here getting a foothold.

"Budget" is the word commonly used to describe this system. The French word "*bougette*," traced to Latin *bulga*, appears by the old French writers to have been used for describing a bag, a pocket, a purse. It became obsolete in France, but was borrowed by England, and, changed into "budget," about 1760 began to be used to describe the great leather bag in which were carried to Parliament the documents necessary to the Minister for explaining the financial needs and resources of the country, and his program. From this it was but a step, quite natural, to the application of the term to the program itself. Forty years later, in its new form and with its new meaning,

it traveled back to France, where in the decree of the Consuls for 1802 and 1803 it replaced the former estimates of receipts and expenditures. Although spoken of in a French report of the time as "a barbarian word, even in England," it so well met a need that it became entrenched in the language of both countries. Definers have differed as to its present scope. One of the more recent, Stourm, profiting by the shortcomings of his predecessors, says. "The budget of the State is a document containing a preliminary approved plan of public revenues and expenditures."<sup>1</sup> American usage, however, does not necessarily include revenues. Probably the word here more often carries the idea only of expenditure. Because of the variance in conceptions of the thing itself, my own preference is for a briefer and broader definition — "A budget is a financial program."

Stourm, for his exhaustive study, classifies into (1) Preparing the budget, (2) Voting the budget; (3) Executing the budget, (4) Enforcing accountability. This, it will be seen, is half legislative and half administrative. Only the legislative half here concerns us. It may be best examined by considering first the initiative

#### INITIATIVE BY THE EXECUTIVE

Financial proposals may have their origin in the mind of —

- (a) The Executive (President or Governor), or
- (b) An Executive Agent (a Department official, or a member of a Board, Commission, or the like); or
- (c) A member of the Legislature; or
- (d) A citizen.

Who first conceives the idea, is of slight practical importance. Significance begins with the man who publicly presents it, and is due to the impetus resulting from his position and power. Naturally our first appraisal of any proposal is affected by our expectations of the propounder. For this reason various learned men without much personal experience in public life have assumed that the wisest proposals must be those coming from President or Governor. To be sure, it is often the case that men who have reached such positions are well versed in public affairs and equipped with the information necessary for sound judgment, but it is also true that not rarely in America our political system throws into the highest positions men quite unfamiliar

<sup>1</sup> René Stourm, *The Budget*, T. Plaz'nski, tr., 4

with the science of government and having little or no experience in public service. This may be suggested as the first difficulty in the way of the budget reform.

Furthermore, though a man may have made his mark in legislation, the chances are he will enter the executive chamber without any such broad, comprehensive knowledge of the administrative field as the budget reform presupposes. Perhaps he will quickly acquire that knowledge, but he is a novice when he sends his first message to the Legislature. Under our political system probably one out of every three inaugural messages is the work of a novice.

There is, indeed, the presumption that a man so able as to be elected a chief magistrate, will possess the knowledge of men which will let him discriminate between good and bad advice. Yet even this may not be taken for granted. Note what was said to a committee of the New York Constitutional Convention of 1915 by John J. Fitzgerald, long Chairman of the Committee of Appropriation of the National House: "I have an interesting line of correspondence in my files, extending over a number of years, coming right down to date, and it is similar in all instances, in which the Executive expresses his sympathy with the efforts to keep down public expenditures as low as possible and expresses some complimentary expressions to those engaged in that work, 'but this matter has just been called to my attention and it seems so important and desirable, I hope it will be possible to make provision for it' I know, I know that the most ancient, time-worn, moss-covered things that have been rejected time and time again, are placed before the Executive in such an attractive way that these letters come about them. He doesn't know, and he can't know" <sup>1</sup>

The proposal of the budget reformers is that President or Governor shall prepare and submit a financial programme, as his own, for which he is wholly responsible, with the impetus of his official prestige to help carry it through. Stourm expounds this part of the reform as if there could be no question about it. "Necessarily and legally," he says, "the Executive prepares the budget. The Executive alone can and should do this work. Situated at the center of government, reaching through its hierarchical organization to the smallest unit, the Executive more than anybody else is in a position to feel public

<sup>1</sup> *N.Y. Convention Doc.*, 15, p. 21.

needs and wishes, to appreciate their comparative merits, and accordingly to calculate, in the budget, a just appropriation which each of these needs and wishes deserves. Others may know certain details as well, possibly better than the Executive, but nobody can have so extensive and impartial view of the mass of these details, and no one can compromise the conflicting interests with so much competence and precision. Moreover, the Executive, charged with the execution of the budget, is compelled, through concern as to his future responsibility, to prepare as well as possible the plan"<sup>1</sup>

All this might be true of a theoretical Executive, constructed in the work-room of some professor of Political Science. Unfortunately much of it is not true of the flesh-and-blood Executives who are supposed to govern American Commonwealths or the Nation itself. The very conditions of their being prevent them from having any view at all of the great mass of the administrative detail. Other duties are too many and the days are too short. The social obligations of an American Executive make a great demand on his time and strength. In the larger States he is under constant pressure to attend all sorts of functions, to make innumerable speeches, to receive a great variety of callers on every conceivable kind of business. Proper attention to the appointments to be made to office might well engross the energy of one man in some of our States. His inspection of the State institutions must be most perfunctory, many of the officials he gets no chance to meet from one year's end to the other. Only the most credulous imagination will conceive that if he prepares a budget he will have personal knowledge of more than a small part of its details. Very largely he must rely on the judgment of others.

It will be retorted that this is equally the case with the president of a great corporation. Advocates of the budget frequently, unnecessarily, and dangerously thus call on the lessons of commerce and industry to fortify their arguments. As a typical illustration, take the suggestion of a parallel made by Vice President Charles D. Norton of the First National Bank of New York. Said he. "When the president of a large business corporation goes before the annual meeting of his stockholders or directors, he makes a statement of the assets, the liabilities, the surplus and the profits of the year. The figures are so dis-

<sup>1</sup> René Stourm, *The Budget*, T. Plazinski, tr., 53



played that they will tell their own story and show the results of the year's operations. He states what his plans are for the next year's work, whether he wishes to expand or contract the business, what he wishes to spend in permanent improvements; what new capital he needs, and how he proposes to raise it. He is ready to answer questions and to explain his plans and policies. That statement is his 'budget.' If approved, it becomes his program for next year's work. If the natural businesslike relation which exists between the head of a private business and his directors and stockholders can be created between the Governor and the Legislature, and if this relation can be defined in the Constitution of the State, a budget system will certainly be the logical outcome."<sup>1</sup>

The basic objection to this is that democracy assumes as wiser for the public interest a course of proceeding directly the reverse. Democracy works from the bottom up, not from the top down. It accepts leadership but reluctantly and with strict limitations. Private business extols and glorifies leadership.

Mr. Norton went on to say "Our Federal, State, and municipal charters have surrounded government executives with fantastic regulations which, if applied in private business, would certainly wreck any enterprise dependent for its existence on yearly profits." This calls for emphasis on another divergence, one of great importance. The public business does not depend for its existence on profits at all. In constitutional theory it would transcend its functions if it made any profit whatever. It is a mutual benefit society and its success is measured by service, not by dividends. Therein may be found the one great argument for public ownership and operation of utilities, for government permits and approves the performance of much service that by commercial standards would be adjudged unprofitable, but that is really for the common welfare. Keeping off such debatable ground, it is clear that in the functions already common, government is not a profit-making enterprise.

Where service, and not profit, is the paramount consideration, it may very well be that the views of the associates would be more easily pressed and more seriously considered than in an organization based upon the theory that for the sake of money

<sup>1</sup> *Constitutional Provision for a Budget*, to the Academy of Political Science, New York, November 19, 1914.

gan the members may wisely make a few of their number trustees for the time being, with complete, uncontrolled administrative authority vested in one man

Still another difference between the Executive of State or Nation and the President of a corporation, is to be borne in mind. Ordinarily the corporation enters but one field of endeavor and its President not only is expected to be, but actually can be, an expert in that field. State and Nation enter a hundred fields of endeavor, with the greatest diversity of scientific requirement. Solomon would not be wise enough to master them all. It would be folly to expect President or Governor to be foremost or even skilled at the same time in penology and agriculture and irrigation and education and sanitation and military science and insurance and a hundred other things more or less unrelated.

The same considerations make it hard to accept the view of a kindred phase of the situation taken by the foremost American exponent of the budget, Professor F. A. Cleveland. After declaring that a budget is to self-government what the proposals contained in the annual report of the president of a corporation are to the board and stockholders, he goes on to say "The need for an exact statement of these proposals is to be found in the fact that the Executive is the one responsible for carrying out the details of administration" <sup>1</sup>

Is it true that because a man is responsible for executing a project, he should be responsible for designing it? Have the architect and the contractor no different functions? Is the contractor necessarily the best architect?

In this matter of "responsibility" great confusion prevails. Few words are nowadays more abused. To paraphrase Madame Roland "Responsibility, what crimes are committed in thy name!" Responsibility implies punishment. What could be more unjust, more cruel, than to require real responsibility of President or Governor for the whole operation of government, to deal out punishment for every incapacity, every inefficiency, every failure? American common-sense never has accepted, never will accept, any such idea. We do not choose our Executives with it in mind, we do not pass judgment on them with it in mind. A political party may be put into office in the hope that it will better administer affairs, or be turned out because it

<sup>1</sup> *Organized Democracy*, 456

has badly administrated them, but the question is always one of totals, not of details. Only in the rarest instances do we punish any Executive because of the shortcomings of minor officials. Broad policies may and should determine the fate of President or Governor, but his personal fortunes ought not to rest on the work of administrative agents.

Unless our system of government is radically unsound, a President or Governor must be assumed to be the most likely to reflect the popular will on broad questions of public policy that directly affect the whole electorate, the questions uppermost in political campaigns. It follows that a proposal emanating from President or Governor on a broad question of public policy, such as old age pensions, or public ownership, or the sales tax, is weightier than if coming from any other source. In matters of administrative detail, however, the probabilities favor the judgments of others, and notably of the administrators who by long service or special training have become experts in their particular fields of administration, as well as the legislators who by years of work on this or that committee have become familiar with its particular problems. It may also chance that a private citizen who has never held public office will be better informed concerning a public need than any legislator, administrator, or executive. Taken by and large, in matters of administrative detail I should rank foremost the probabilities of wise suggestion by administrative officials; next, legislative committee chairmen, thirdly, Executives, fourthly, the mass of legislators, with the judgments of private individuals varying too much in worth to permit even an average.

#### DEPARTMENTAL INITIATIVE

Originating by the Departments is the method that leads to by far the greater part of our public expenditure. As a matter of procedure, and sometimes by constitutional requirement, their reports, usually the basis for action and often containing specific suggestions or requests, are submitted through the Executive, but he rarely adds the weight of his own opinion. This makes of little consequence the fact that in the national government the Treasury has permission to report directly to Congress. At the very beginning the treasury was put on a basis of especial prominence, by the law of 1789, and Congress speedily began asking Alexander Hamilton for advice, which

he was far from reluctant to give. Men who differed with Hamilton did not relish this and when in 1795 through the efforts of one of them, Albert Gallatin, the Committee on Ways and Means was established, it was designed to be a check on the Secretary of the Treasury rather than an agency for co-ordinating the financial policies of the Treasury and the House. Full cleavage could not last long, for their interests had too much in common, and there is evidence that in 1796 the two were beginning to work together.<sup>1</sup> In 1812 Calhoun complained about the relationship. "What, sir, constitutes a feature in the report still more extraordinary and objectionable, is the apparent understanding between the Committee and the Treasury Department. They coyly refuse to recommend any positive act of legislation, while they indirectly intimate what they expect the Secretary of the Treasury to do" <sup>2</sup>

In 1878 the Speaker laid before the House a communication from the Secretary of the Treasury, stating that discussion as to a reduction of taxes on spirits and tobacco had resulted in a decrease of revenue, which might make necessary the imposition of further taxes by Congress. Carter H. Harrison made the point of order that the Secretary was not authorized to recommend legislation to Congress except when his views had been requested by one House or the other, but the Speaker overruled the point on the ground that the statutes required the Secretary to give information respecting matters appertaining to his office.

Nowadays the constitutional privilege of the Secretary to make direct report has no practical result, for the Secretary is no more likely than any other Cabinet member to advise anything known to be distasteful to the President. As a matter of fact all the Secretaries have virtually a free hand in making up their estimates. Nothing indicates that a President ever concerns himself seriously with them, unless in the broadest sort of way on questions of general policy. By and large the same thing is true of the State Executive. In Massachusetts, I know, the great bulk of the appropriation springs from the advice of Departments, Bureaus, Boards, and Commissions. Nothing leads me to think that is not the case in every other State.

The valid criticism on the unrestrained initiative of Depart-

<sup>1</sup> Ralph Volney Harlow, *The History of Legislative Methods in the Period before 1825*, 237

<sup>2</sup> *Annals*, 12th Congress, 2nd session, 316

ments is that each tends to magnify its own consequence. Naturally, inevitably, the specialist thinks his own specialty all-important. Self-interest, the most powerful of human motives, impels him to try to enlarge the scope of his powers and activities. Furthermore, he is tempted to ask for more than he really needs, in the expectation that his full request will not be granted anyhow. "What we need in this country," well said Representative Claude Kitchin when the Federal budget was adopted, "is a budget system for the Administration, to keep them from spending so much."

Not only is the head of a Department liable to misjudge his own deserts, but also he is unfitted to determine those of other Departments. For this reason it would be unwise to pay heed to proposals for putting the work of preparing a State budget on any official below the Governor holding a position already in existence. The probability is that such an official will not usefully recommend in the matter of expenditure for purposes not already covered by statute. Such officials are supposed to be chosen to execute existing law, not to advise new law. Accustomed to work in a single field, each of them has no particular acquaintance with matters beyond its borders. They are expected to have little or no sympathy with the province of other officials. The State Auditor, for example, is in theory a book-keeper primarily, the State Treasurer, a cashier. It is for this reason that any sort of Board made up of State officials is almost invariably a failure. There is no reason whatever to expect such a Board would do well at budget making.

Furthermore the system of choosing administrative officials by ballot often puts into office men without any special qualification for the work expected of them. Not rarely these offices are the last resort of men who have proved their incapacity in commercial or professional life, and turn to political acquaintance for a livelihood. In too many cases their offices are looked upon as sinecures, the rewards of political prowess. Until these offices are filled by appointment there is no certainty that their occupants will be of any help in meeting the financial problems of the public.

#### INDIVIDUAL INITIATIVE

Departmental initiative is not the spot on which criticism is commonly focused. The critics devote nearly all their energies

to the comparatively small part of appropriation that springs from independent initiative as averred to be exercised on the floor of legislative assemblies. Thereby the public has been grossly deceived. Another result has been that budget reformers have not infrequently lost the sense of proportion.

"Pork-barrel" is the epithet that has done the mischief. Its implication is that legislators put their hands into a metaphorical barrel and pull out "pork" with which to satisfy the ravenous appetites of greedy constituents. Chiefly has the slander been aimed at Congress by reason of two appropriation bills — one for the improvement of rivers and harbors, the other for the erection of public buildings. The charge is that untold millions are wasted despite the protest of the few honest men in House and Senate, against the advice of the government experts, and to the abhorrence of the whole administration.

What are the facts?

When a Congressman thinks money should be spent on a river or harbor in his District, he must first persuade a committee to recommend and the House to agree that a survey shall be made. This must be repeated in the other branch. If that were the whole story, there might be just criticism, for so far attention to the project will have been largely perfunctory. The story, however, has only begun. Now comes the technician, assumed, and usually with right, to be expert, unprejudiced, disinterested, honorable. The Chief of Engineers of the War Department, through his staff, which is composed of capable engineers, directs a preliminary examination to be made by a district officer. If this officer is convinced by his examination that the project would be useful and probably ought to be undertaken, then a regular survey is authorized, followed by an estimate of cost. If the report is again favorable, it goes to the Board of Engineers for Rivers and Harbors, consisting of seven men, a Brigadier General, Colonels, and Majors, all of practical experience in this field. They make careful examination. If they in turn favor, their report must be approved by the Chief of Engineers before recommendation will be sent to Congress by the Secretary of War. Departure from this normal procedure, due to the exigencies of depression, will presumably end with better times.

The special committee that in 1919 studied the budget question was made up of some of the ablest men in the House,

men of long experience and the highest standing. They were agreed that not in their time had a single expenditure for improvement of river or harbor been advised by the Committee on Appropriations unless it had been recommended by the army engineers and approved by the Secretary of War. Further, several of the members could not recall a single instance where by amendment on the floor of the House an item had been inserted for a project that had not been surveyed and recommended by the engineers and approved by the Secretary. Chairman Good thought a few items had gone in on the floor, but negligible in amount. Senator Jones of Washington, discussing the matter, October 17, 1918, said the Commerce Committee of the Senate had a rule that no item should be put into a River or Harbor bill unless recommended by the Department, and that although he had known of some instances where the rule had not been followed, they were very few.

The slate has not always been so clean in the matter of public buildings. Postmaster General Meyer wrote to Professor Ford, February 26, 1909 "As a general rule, in the preparation of Public Buildings bills the executive branch of the government is not consulted with respect to making appropriations for the new public buildings. At the last session of Congress more than twenty millions of dollars were appropriated for the exclusive use of post-offices in the smaller cities and towns, where the Department had made no recommendation for new buildings."<sup>1</sup> Since Mr. Meyer made that statement, the situation has bettered. In the Budget hearing ten years later members of the committee classed public buildings with rivers and harbors when they said they could recall few if any instances of appropriation without previous departmental estimate and recommendation. More than that, James R. Mann asked on the floor of the House December 11, 1918, if it was not a fact that every year the estimates for public buildings and rivers and harbors vastly exceed the appropriations made by Congress, to which William P. Borland replied that in his experience always, without exception, the approved projects for these things coming in from the Departments had exceeded what Congress was willing to grant. The two agreed that the Committees on Appropriations confined its attention for the most part to reducing or cutting out items for which estimates have been submitted by the Departments.

<sup>1</sup> H. J. Ford, *The Cost of our National Government*, 131

If any muck-raker, forced to admit that the Committees on Appropriations do good work, persists in the delusion that against its advice large additions are carelessly made on the floor of the House as a result of log-rolling, importunity, friendship, or any other cause, let him be told that the records for many years show that the net increase of appropriations on the floor, beyond the Committee reports, has been less than one tenth of one per cent

Totals ought to prove the case. In the hearings before the special committee on the budget it was brought out that in the twenty years before the World War Congress had appropriated \$595,000,000 less than the administrative estimates. Shaving and saving went on even after the budget system had been established. In the next dozen years there was total net reduction to the amount of \$479,171,314 14. Omitting the first of these years because abnormal by reason of the financial aftermath of the war, and the last two by reason of abnormal financing due to the depression, the remaining nine (fiscal years 1924-1932 inclusive) showed net reduction averaging \$11,390,-101 66 a year.

If the muck-raker persists in flouting figures and counting as for naught the testimony of men who know, bear in mind that if every dollar spent in the direction most criticized had been spent uselessly, against the advice of the experts, yet would the whole amount wasted fail to justify the weight given to this class of expenditure in the reckless abuse of Congress that has done so much to shake public confidence in representative government. Up to the time of the Great War the total expenditure for construction, extension, and repair of public buildings under the Treasury Department, including post-offices, marine hospitals, quarantine stations, court-houses, and miscellaneous buildings, amounted to only about three quarters of one per cent of the total expenditure of the nation.

Whatever the joint blame, remember that insofar as Presidents have signed these bills, they have shared the responsibility. Claude Kitchin pertinently told the Budget Committee he had never known a President to veto a bill because it was appropriating too much. Since he had been in Congress (twenty years), it had been one long contest between the Committees on Appropriations and the Administration, the latter urging larger appropriations and Congress insisting on cutting them



down. Contrast this with the statement made by the English Committee on National Expenditure in 1918, that there had not been a single instance in the last twenty-five years when the House of Commons by its own direct action had reduced on financial grounds any estimate submitted. It is indeed to be remembered that an English Cabinet is the chief executive committee of Parliament, virtually its Committee on Appropriations, but it is also the Executive Board — a blending of functions not always borne in mind by our budget reformers. The administrative element is sure to predominate when appropriations are concerned. It can hardly be questioned that the money of England is raised and spent by her administrators as such. Surely it would have been unfortunate if our borrowing of the budget system from England had been followed by such almost servile acceptance of the executive pleasure. That would have justified the apprehensions of those who predict that proportionately as the initiative of an Administration is strengthened, the interest and zeal of the legislative branch will wane.

A few classes of expenditure measures, conspicuous among them what are known as special or private bills, have hitherto been almost wholly originated by members of the lawmaking bodies or by private citizens exercising the right of petition. Many broad questions of public policy have started from the same source. It is the wisdom of permitting such origin that is one of the points brought in issue by some though not by all the advocates of budget reform. The allegation is that individual initiative is unlikely to conduce to the common welfare because it is generally narrow and selfish in its purpose. Thus President Lowell of Harvard, arguing before a committee of the New York Convention of 1915 that Governors represent the public interest, averred that legislators represent individual interests. Doubtless he did not mean anything quite so extreme as this sounds. It is true that many legislators think it their paramount duty to represent the interests of their own localities, but that is not true of all legislators. Every legislative assembly contains some men who put the general welfare first. Commonly they are strong men and often their influence is controlling.

Furthermore, when Mr. Lowell said a budget is a public matter, "not a collection of private matters," with the implication that the proposals of individual members are private matters, did he not make a somewhat violent assumption? A budget

is a grouping of items — of units and fractions of units. Does one of these units or fractions of units cease to be public and become private because of its origin? Is it transformed from private to public because Commissioner Smith or Representative Brown suggests it through the Executive instead of direct to the Legislature? Is a bridge carrying the highway over Mill Creek not a public concern? And what is there private about a building for a post office or a county court?

Another university President, F J Goodnow, of Johns Hopkins, likewise an adept in political science, under the same circumstances approached the subject also from Mr Lowell's point of view, dwelling on the irresistible tendency, to his mind one of the most dangerous tendencies of popular government, toward useless expenditures in localities for the purpose of increasing locally the influence and standing of the Representatives in the Legislature. An offset to this tendency he thought could be provided only by having the estimates determined upon before they are submitted to the Legislatures, by somebody who is representative not of this locality or of that locality but who is representative of the State as a whole. And therefore it seemed to him an absolute necessity, if we are to keep down the expenditures of the State government, which are increasing at such a tremendously rapid rate, that we must provide to check the tendency of localities to demand the expenditure of State money for local purposes, and purposes that are not consistent with the interests of the general State as a whole.

Here is to be observed the assumption that the increase of public expenditure, at such a tremendous rate, is *per se* indefensible. It is the common assumption of the critics, but is it valid? Who has shown that there is anything inherently wrong or even rash in the desire on the part of a people to do more work co-operatively? If the citizens conclude it is for the general welfare that private activity shall be further replaced by public activity in the support and care of the sick, the crippled, the infirm, the aged, the insane, the degenerate, does their decision in and of itself show folly? It is a remarkable fact that the critics are constantly generalizing about the waste of millions on millions of the public funds, yet when called on to specify, rarely can name classes of outlay they would abandon. Here and there they may point out instances of extravagance. There is much inefficiency in the conduct of public affairs, no doubt. Yet it

has not been shown that on the whole the vast spread of co-operative activity in the last generation has been unprofitable, unwise, or dangerous. There are those of us who believe that public schools, libraries, parks, highways, boulevards, harbors, buildings, and all other co-operations are proofs of an advancing civilization. In what does the stone age more contrast with ours than in respect of the capacity of men to work together? And why should not the enormous increase in the wealth of the world brought by the inventions and developments of the last hundred years, be in ever-growing measure used jointly for the common welfare?

However, no candid observer will deny that the system of individual initiative uncontrolled does bring into legislative bodies certain serious evils. A large assembly is not a fit body to measure respective merits. It is too cumbersome to apply the yardstick or use the scales. It gives too wide an opportunity for an enthusiastic proponent possessed of energy, skill, and audacity, to accomplish his personal desire without regard to other public needs. The result is that the most active and the most noisy, not the most deserving, benefit. The trivial matters are often magnified to the eclipse of problems having far greater real importance.

Worse yet, the baser springs of human nature are brought into play. Unbridled self-interest prompts some men to raids on the treasury meant chiefly to further their political fortunes. Such men work to ensure re-election or promotion by getting something for their constituents, little matter what. Forgetting public duty and their oaths of office, they barter their votes in return for votes, and log-rolling breeds its baneful progeny. The power of the "boss" and the "machine" and the "organization" grows with the ability to dispense favors in the shape of appropriations, or to punish opposition by their refusal. Although all these evils do not develop in all our assemblies, and where found vary greatly in degree, their total of mischief is too serious to be swept aside. It is of vital consequence to crush them where they exist, to keep them out where they have not yet entered. This alone is enough to justify the curbing of individual initiative, or at any rate to counteract its evils by orderly processes.

## CO-ORDINATING THE FINANCES

The budget reform contemplates improvement both in the initiative and in the processes following. Before examining the changes suggested, it will be useful to determine if we can what are the purposes to be accomplished. To that end let us eliminate more of the needless or dubious argument.

Critics often lay too much stress on what President Hadley spoke of as the "lack of co-ordination" under the present system.<sup>1</sup> As a type of familiar dogmatism on this point, take two sentences from E. E. Agger: "Divided responsibility in budget matters renders a scientifically equilibrated budget practically impossible. This particular criticism is such a common one and so obvious that a mere statement of it is sufficient."<sup>2</sup> Yet it may be questioned whether the criticism has any valid ground whatever. It is not divided responsibility that makes "a scientifically equilibrated budget" impossible; it is the nature of government. No system can secure such a budget, no system ought to secure such a budget. Modern government tries to meet a thousand social needs. They differ as the pear and the plum, the tulip and the pansy, the song and the statue. They have no common factor, no homogeneity, often not even relationship. Only in the roughest way are comparisons possible. We may say that provision for health is more important than provision for pleasure, that the development of industry should be preferred to the development of art. But scientific adjustment is hopeless.

What actually takes place in American legislative processes is that when the total of appropriation bids fair to result in a tax increase larger than the people are likely to stand without partisan revolt, whoever has the authority starts in to prune — sometimes the President or Governor by the use of the veto, sometimes the legislative committee by cutting down or cutting out items of the general appropriation bill, or the legislative leaders by killing special appropriations. This is of course quite unscientific. It is the crude, inexact method of all legislative procedure. It is the survival of the strongest, not necessarily of the fittest. So far as a budget betters this by throwing merit into the scale, whatever helps the determining of merit

<sup>1</sup> *World's Work*, Dec., 1915, p. 198.

<sup>2</sup> *The Budget in Am. Commonwealths*, Col. Univ. Studies, xxv, No. 2, p. 70 (1907).

is worth while, but it is a vain hope that a budget will do more than lessen somewhat the irregularities of public economy.

More illogical is the widespread demand that expenditure shall be co-ordinated with revenue. The readiness with which this demand has been accepted is most remarkable. It has become almost a commonplace in the language of the reformers. They rank it high in the scale of the changes that must be made if the country is to be saved. Thus when the members of the National Economic League — a large number of thoughtful men in various parts of the country — were asked in 1915 to show by vote what they deemed to be the questions of greatest importance before the country, of the twenty issues thought to be of paramount consequence, the ballot put in fifth place the "National Budget," which was defined as "the introduction of a scientific budget for the purpose of showing the relationship between national revenue and expenditure."

The state of mind this indicates is more English than American. In a country like England where until recently government has been almost entirely in the hands of the wealthy classes, the aristocracy, it has been natural that revenue should take the foremost place. The lawmakers have been more concerned over taxation than expenditure. Those American writers who think English institutions preferable, have viewed with alarm our tendency in the opposite direction. We look first at details, letting aggregates take care of themselves. We decide in each particular what we think we ought to have, and we add our separate decisions to find out what shall be the total of taxation. To be sure, in England details are studied, and here we do not forget the importance of aggregates, but in each country respectively these are the secondary considerations, in theory, though as a matter of fact I surmise the English nowadays worry as little as we do about cutting the coat to suit the cloth.

Foremost among those who wish us to adopt a "responsible government," the English cabinet system, has been Woodrow Wilson. One of the arguments he advanced for that system in his book on "Congressional Government" was our failure to co-ordinate revenue with expenditure. "There can be no doubt," he said, "that, if it were not for the fact that our revenues are not regulated with any immediate reference to the expenditures of the government, this method of spending according to the suggestions of one body, and taxing it in obedience

to the suggestions of another entirely distinct, would very quickly bring us into distress, it would unquestionably break down under any attempt to treat revenue and expenditure as mutually adjustable parts of a single, uniform, self-consistent system. They can be so treated only when they are under the management of a single body, only when all financial arrangements are based upon schemes prepared by a few men of trained minds and accordant principles, who can act with easy agreement and with perfect confidence in each other" <sup>1</sup>

In 1909 Congress enacted that when the Secretary of the Treasury transmitted his estimates, he should send a copy to the President, who was thereupon to advise Congress "how in his judgment the estimated appropriations could with least injury to the public service be reduced so as to bring the appropriations within the estimated revenues." Not only Mr Taft disregarded this injunction, but also Mr Wilson. Perhaps when the critic became President, he still adhered to the conviction that only his full programme of unification would accomplish anything.

With the tremendous outlays that accompanied the battle against the great depression which continues at this writing, came vital need to recognize the kernel of truth within Mr Wilson's somewhat exaggerated averment that "our revenues are not regulated with any immediate reference to the expenditure of the government." Our nation could not have continued through nearly a century and a half if revenues had not conformed to expenditures, however roughly. Failure to achieve this promptly is the reason for the present demand, "Balance the Budget!" Not for a moment would I question the validity of that demand. The political issue is whether at once the thing shall be done by reducing expenditure or by increasing revenue. Here we are not considering object but mechanics.

Since Mr Wilson as author set the pace, it has been common to meet in criticisms of our legislative processes such statements as, "Our income is raised by one set of men, our expenditures are applied by another." That particular sentence follows soon after this in an essay by Alfred Pearce Dennis, on "Our Changing Constitution," in the *Atlantic Monthly* for October, 1905. "The central, vital weakness in our legislative system is its lack of unity and coherence." Many another complaint

<sup>1</sup> *Congressional Government*, 180

to the same effect could be quoted. All seem to take it for granted that something vicious here lies. Yet none of them appear to have reflected that a State or Nation spends what it chooses; the income is considered afterward, and there is no compelling reason why its details should be determined by the same body of men.

Here again the lessons of the commercial world or of individual experience are mischievously misleading. A business firm or corporation expects to invest all its capital. Most individuals spend all or nearly all their earnings. On the contrary, a State or a Nation impresses but a small part of the capital within its borders, spends but a minor part of the income of its citizens. In practical effect its resources compared with the needs now viewed as normal by men who are not Socialists nor Communists, are limitless. No total of ordinary expenditure likely to meet with acceptance would approach the limit of resources. Therefore the really determining question for State or Nation is never, "Can we afford it?" — but it is, "How badly do we want it?"

If the amount of public revenue is a matter of will, may be determined at pleasure, and if the amount of expenditure ought to be co-ordinated with revenue, making the determination of revenue the precedent consideration, it would follow that State or Nation must decide how large a proportion of the total of individual revenues can with wisdom be spent co-operatively. This means a fixed maximum for co-operative expenditure. Would that be desirable? To put it concretely, would it be wise, for example, to say that in no case will we take for ordinary outlay more than ten per cent of the total of individual earnings? Why ten per cent rather than five or fifteen? Or supposing by some marvel of logic we might satisfy ourselves that at the moment ten per cent is the precisely correct figure, how shall we know that next year it ought not to be changed to eleven or nine? According to the Statistical Abstract of the United States, our per capita wealth grew from \$307.69 in 1850 to \$1,981 in 1932, it is estimated. There is every reason to expect it will keep on growing, but prediction as to the ratio, and a financial program based on that prediction, would be idle. If the people wish to pool for the common welfare a steadily growing part of their steadily growing wealth, why should they not? We can go very far in that direction and still leave to each

individual for his private needs and pleasures greatly more than his fathers had

Yet most men rightly feel that the element of caution and prudence should affect our decisions. How to give it due weight is our problem. At present we rely mainly on the conflict of instincts within the legislative body. Any one who has studied the psychology of a Legislature must have observed that the potently restraining influence is the total of expenditure, not the detail. What the fear of God is to the sinner, the fear of the tax-rate is to the legislator. I watched the tax-rate in my community grow by one-half in twenty years, saw the direct State tax double in ten years. Nobody ever suggested going back to the expenditure of ten or twenty years before. In other words, nobody argued that the danger point had been passed at some distance back. The cautious thought it had been reached at the preceding session; the venturesome thought a little more might be wisely spent. The pressure for advance in specific directions met the pressure to hold back, impetus met inertia, with the result of course that the stronger prevailed.

It is possible to conceive that some day impetus may get much the better of inertia. The singularly successful balance hitherto preserved between the centrifugal and the centripetal forces working on our sphere of government may yet be destroyed, and the alarmists have been predicting such disaster if we do not reform our ways. Note, for example, what Professor H. J. Ford had to say in his book on "The Cost of Our National Government" (p. 5) "With expenditure exempt from control, bankruptcy is, of course, only a question of time in any business public or private." The flaw is in the implication that public and private business are on the same footing. By "bankruptcy" we mean, according to the dictionaries, the state of a man whose business is stopped and broken up, because he is utterly incapable of carrying it on, because he is unable to pay all debts. Nothing of that sort appears when the only need is to raise more money and it can be raised. So far that has been the only need with the public business of our own country and we have not even approached the exhaustion of our resources. To be sure, at this writing, after some years of great depression, some of our municipalities and counties are nominally bankrupt because they cannot at once meet their obligations, but that is because of restrictive constitutional and statutory provisions beyond



quick and easy change, not because of exhaustion of resources.

It is the fear of bankruptcy, or at any rate of unwarranted extravagance, that has led a third of our States to put a constitutional limit on the State tax. The protection is of doubtful expediency. If anywhere such restrictions are wise, it must be in the case of city government. Yet in my own State of Massachusetts after a long test of limits on municipal tax rates they were in 1913 abolished (except for Boston), as part of a movement for reforming municipal finance.

As a matter of fact figures showing the increase in the cost of State government are not necessarily so alarming as they look. Especially is this the case when they are given in percentages. The basic figure of the percentage may have been so small that percentage increase means little. It is true that half a century ago State expenditures were relatively insignificant when compared with those of nation and municipality. To start the computation with them and with no explanation of this, misleads. Furthermore, no small part of present-day State expenditures are of a sort formerly incurred by lesser divisions — cities, towns, counties — in whole or in part. The transfer of the activities concerned to State or Federal control, brings in a confusing factor.

Another of the delusive arguments for the budget has rested on the vain hope that a systematic presentation of the financial program will secure the help of public scrutiny and criticism. It is to be doubted if any man with experience in public life shared the confidence of Professor Cleveland when he said of the budget: "It provides for full publicity in review and discussion of plans, and through this enables the people themselves to follow discussion and criticism, and makes the electorate effective in determining whom they shall trust with the conduct of affairs" <sup>1</sup>

Equally chimerical in the eyes of the doubter was Charles Wallace Collins, writing in the *South Atlantic Quarterly* for October, 1916, and holding that the budget would give the people a concrete plan for criticism and discussion. "It would bring their public business home to them. What is now a mystery to the average man would become a topic of daily conversation. The sovereign citizen would be in a position to keep a

<sup>1</sup> *The New Republic*, July 22, 1916

closer watch on his public servants Efficiency and economy would be practiced and democracy furthered on its way."

That at least some of the really serious work of Legislatures and Congresses might become again "a topic of daily conversation" is a consummation devoutly to be wished, but why take time for dreaming of it? The newspapers, edited by keen men whose very livelihood depends on publishing what the sovereign citizen wants to read, rarely now describe or discuss in detail the serious doings of our legislators The newspaper judgment is that the sovereign citizen takes no interest in these doings and will not read about them Ordinarily no information reaches a constituency regarding the action of its representative on any proposed expenditure. At remote intervals a community, believing itself overburdened by taxation, will rise in its majesty and blindly smite anybody it can reach. Then it relapses into indifference No tabulation of dreary figures will have any charm for Mr. Average Citizen Better put "Publicity" up on the shelf with "Responsibility."

## CHAPTER XIII

### STUDY AND PREPARATION

FORTUNATELY it is not necessary to rely on false analogies or mistaken conceptions in order to prove the desirability of the essential parts of the budget reform. Apart from all question of initiative, the utility of preliminary study and systematic presentation is enough to win the case.

Preliminary study is the only way to meet the conditions of a legislative session. These do not permit adequate investigation. Time is lacking. Many members, especially in the Legislatures of States cursed by the rotation system, are quite unfamiliar with the problems.

That an orderly, comprehensive statement of financial resources and needs will be of value cannot be denied. It will help toward intelligent study. Governor Whitman was right when he said that a large part of the confusion in the administration of State finances has resulted from a lack of intelligent study and not from any inherent desire of our legislative bodies to do things improperly or incorrectly.<sup>1</sup> The science of accounting has inestimable value in the way of enlightenment. Systematic presentation illuminates. It should come at the opening of the session and therefore ought to be prepared in advance.

The budget system now in favor contemplates combining investigation and presentation. How this may best be done, is still matter of discussion and experiment, but we are making progress toward agreement. Action began when about the middle of the last century the problem became serious because the people entered that new field of joint activity which is the remarkable phenomenon of our time. With the increase in co-operative expenditure that has now attained such formidable proportions, came the necessity for regulating its processes.

Maryland appears to have taken the first constitutional step, a short step, to be sure, yet a beginning. In 1851 it directed that the Comptroller should "prepare and report estimates of the revenue and expenditure of the State." Alabama in 1867 approached the problem tentatively from a different angle,

<sup>1</sup> *New York Herald*, January 21, 1916.

requiring the officers of the Executive Department and of the State institutions to report to the Governor five days before a regular session of the Assembly, the reports to be transmitted with his message. In the following year Florida applied the same idea when creating "a cabinet of administrative officers," to assist the Governor. Each officer was to report to the Governor not only the receipts and expenditures of his office, but also "the requirements of the same," and the reports were to go to the Legislature with the Governor's message. Illinois in 1870 said the Governor should "at the commencement of each regular session, present estimates of the amount of money required to be raised by taxation for all purposes." A number of States have copied this in essence. In 1901, Alabama came nearer to a real budget, directing that before each session the Governor, Auditor, and Attorney General should prepare a general revenue bill, to be transmitted to the House for use as the House might direct. However, in the next paragraph, giving directions about the general appropriation bill, no provision was made for like preliminary preparation.

Various States tried by statute to get some sort of preliminary systemizing, but the budget idea only slowly crystallized. Not until 1911 did it really get recognition. Then Wisconsin by statute created a Board of Public Affairs, with one of its duties that of preparing a compilation of estimates. This Board was made up of the Governor, the Secretary of State, the Chairmen of the Finance Committees of Senate and House, the Speaker, the President of the Senate, and three members appointed by the President. At first it did not make recommendations, but in 1915 the power to do this was given, together with provision that recommendations by the Governor might be included. In the course of the next five years half a dozen other States followed the Wisconsin plan of a board or committee for preparing a budget. Illinois in 1913 diverged somewhat by imposing the duty on a Legislative Reference Bureau, made up of the Governor and the Chairmen of the legislative committees. This Bureau is in effect a recess committee engaged in accumulating information, with the actual work done by the Secretary. In the same year Oregon chose the Secretary of State for the budget task, but gave him no power beyond that of compiling the estimates in systematic form.

It was Ohio, also acting in 1913, that began making the

Governor the focus of the preparatory procedure. He was required to submit at the opening of each biennial session of the Legislature, a budget of current expenses for the next two years, together with the original estimates of the various departments and officials. He began by appointing a Budget Commissioner, who in fact did nearly all the recommending in the first budget, and it went to the Legislature as the advice of that official rather than as the opinion of the Governor. This was concluded to be unwise and in 1917 Governor Cox submitted the budget as his own. Minnesota and Nebraska in 1915, New Jersey and Maryland in 1916 followed Ohio in preferring the executive budget, Maryland being the first to proceed by way of constitutional amendment. The New York Convention of 1915 determined upon the same thing, by a vote of 132 to 3, but the proposal went by the board with the defeat of the proposed Constitution submitted as a whole. A dozen years later, submitted independently it was adopted, definitely fixing the responsibility of the Governor to prepare and support before the Legislature a balanced budget. Massachusetts had put it into her Constitution by amendment in 1918. Other States followed rapidly and at this writing only Missouri has failed to adopt some sort of budget system.

A national budget was recommended in a report of the Commission on Efficiency and Economy to President Taft in 1912, advising, in brief, that the President should annually submit a budget, containing a budgetary message setting forth the significance of the proposals, a financial statement, summaries of expenditures, revenues, and estimates, and suggestions as to desirable changes in the laws. Details were to be furnished by the Secretary of the Treasury. Congress failed to act, either then or in President Wilson's first term, whereupon the Republican platform of 1916 denounced the Democrats and pledged itself to the support of "a simple, businesslike budget system," such as Mr. Taft had advocated; and the Democratic platform urged return to the old practice of having all appropriations considered by one committee, "as a practicable first step toward a budget system."

Not until after the War did action come. In the Sixty-Sixth Congress a budget bill passed both Houses, but was vetoed by President Wilson on the ground that his constitutional prerogative was violated by the provision that the Comptroller-general

and the Assistant Comptroller-general, though appointed by him, could be removed only by impeachment, a provision meant to secure safe tenure of office through a long term, thus eliminating the political factor as far as possible. The bill was changed to meet the President's objection and passed the House, but failed to pass the Senate. It was promptly re-introduced in the next session, in its original form in the particular objected to by President Wilson, was passed, and was signed by President Harding, less punctilious on this point than his predecessor.

It will be seen that the tendency has been to make the Executive, whether President or Governor, the nominal, the reputed author of the budget. Nobody expects him to be the real author of the great mass of the detail, but it is assumed that he will, whether or no, be what they call "responsible," whatever that may mean. We have already considered some of the objections to having the Executive originate financial proposals. They apply also to forcing on him the sponsorship for the proposals of others. Admitting that he may propound new policies, should he engage in elaborating their details? Should he concern himself with preliminary study of the details of policies already in force?

In this matter may anything be inferred from the well-nigh universal attitude of American Executives for more than a hundred years after democratic principles were put into the form of Constitutions? The delegates to the Federal Convention of 1787 said the President "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." Nearly all the State Conventions gave much the same power to the Governor, in one form of words or another, and in the few instances where the Constitutions do not specify, custom has established the usage. It is not uncommon for the "inaugural address" to state the financial situation, often accompanied by recommendations more or less concrete, but it has not come to my knowledge that before 1916 any American Executive of his own accord submitted anything like an English budget. In that year Governor Whitman of New York submitted what he called a "tentative budget proposal," and in 1917 Governor Milliken of Maine not only prepared the estimates for the ensuing year, but also supervised the drafting of the appropriation bill and went before the legislative body to defend his proposals.

Yet absolutely no constitutional obstacle had stood in the way of any Executive who might have wanted to do the thing. Must not the inference be that a century and more of Executives thought it either unwise or improper? Some doubtless thought it both. If others thought it desirable, expediency prevented. Few more striking instances of the power of custom and tradition are to be found. Presidents Taft and Wilson were particularly outspoken and emphatic in their approval of the budget idea, and many Governors endorsed it. Each and every one of them could have put in force that part of it concerned with originating a program, but they waited for either constitutional or statutory orders.

In explanation, perhaps in defense, it has been suggested that our Executives have not had adequate power for getting and systemizing information. Yet had there been the disposition, in most cases it could have been done. The more valid explanation is that the Executives doubtless felt such a course taken without express constitutional or statutory warrant would have been viewed as a presumptuous invasion of the legislative field, and would have produced nothing but unpleasant friction. Such was the experience of Governor Whitman of New York. When in the autumn of 1915 he opened budget conferences, the Chairman of the Senate Finance Committee and other legislative leaders refused to have anything to do with them, and when he offered the tentative budget with his message there were charges that he was trying to interfere with the legislative right to initiate.

In a letter to Frederick A. Cleveland the Governor held that the existing Constitution obviously contemplated that both appropriation and revenue measures should originate in the Legislature, and he said his submission of a tentative budget in an advisory capacity was as far as he deemed it advisable to go.<sup>1</sup> There can be no question that in taking this attitude Governor Whitman but reflected the temper of our political institutions as it was universally understood until within a few years. Now we are urged to readjust our system of checks and balances, to elevate somewhat the Executive, and correspondingly depress the Legislature. It may not be a proposal to put the cart before the horse. So extreme a metaphor would be unfair, for an extension of the message power of the Executive is not necessarily a political revolution, but as a sign of the times it is significant and serious.

<sup>1</sup> *New York Herald*, January 21, 1916.

If there are good reasons why the Executive should not be the budget-maker, whether because of the physical burden and the limitations of time and strength, or because of the uncertainty as to fitness, or because of the danger in enlarging executive power, or because of any other circumstance, to whom should we turn?

Should it be to the legislative branch?

Preparatory work by a legislative committee has been tried. This resort seems natural in view of the fact that a finance committee sitting during the session of a Legislature has far more work than it can handle well in the hours at command. Indiana began using the device to seeming advantage and satisfaction in 1903. Departmental estimates were to be submitted to the Governor by October 31. After the fall elections he was to transmit the estimates to the members-elect of the Legislature, and appoint a committee of three, not more than two of one party, to visit the State institutions, investigate their immediate needs, and make due report. Leading members were put on this committee. One of them usually became the Chairman of the House Committee on Ways and Means, and frequently another became Senate Chairman of Finance. In Missouri it is customary for the Governor, about thirty days before the session opens, to name a committee of one Senator and two Representatives to visit the institutions, report on their needs, and prepare a tentative budget. About 1908 Virginia began having the Senate Committee on Finance convene thirty days before the session to receive reports from the institutions and departments as to their needs and requirements.<sup>1</sup> Such methods are embarrassed by uncertainty until the session begins, as to who will be on the finance committees. The situation is awkward, too, if the Governor chances not to be of the same party as the Legislature.

New York in 1916 by statute directed that the Finance Committee of the Senate and the Ways and Means Committee of the Assembly should sit during the recess and prepare a budget for the next Legislature. The six minority members of the thirty men on the two Committees took no part, alleging that it would have been useless and that they had not been invited to attend. The bulk of the work was done by four men — the Chairmen and Clerks of the Committees. Indeed, if this plan were to be followed, the work might as well be entrusted wholly to the

<sup>1</sup> See Gale Lowrie, *The Budget*, Wisconsin State Board of Public Affairs



Chairmen. Anyhow they will dominate. And the more who take part in work of this kind, the less likelihood that it will be well done.

Several advantages accompany this procedure. It secures the benefits of experience and interest. It escapes the bureaucratic atmosphere. It permits personal investigation, visits to the institutions and public works, inquiry on the spot. It puts the burden on men who know the temper of the Legislature, who have a fair idea of what can and what cannot get approval. If these men are re-elected or go back to finish the rest of a term, their report is assured personal explanation and defense, with the great advantage of the goodwill and sympathy of most of those who are to pass judgment, instead of the prejudice and hostility likely to meet recommendations coming from the outside. If the Chairmen fail to return — a contingency strongly urged in objection — their report will anyhow be in no worse plight for lack of personal championship than that of any report from outside. Since these men usually know more than anybody else about the financial needs of the State as a whole, there would seem to be desirable gain in somehow making use of their knowledge.

Another place to put the work has been found in that executive or administrative office with function most akin. In other countries where the budget system exists, the task of bringing together the scattered elements of outlay has devolved on the Ministry of Finance. Commonly the routine work of assembling figures has carried with it some degree of control over expenditure. It is always open to the Minister to remonstrate against what appears to him extravagant outlay, or at least to comment. Bastable, writing in "Public Finance" (p. 649), avers that in the fullest development of this power lies a useful safeguard for economical administration. He says the control exercised by the Treasury in England over the spending departments, though often unpopular, is yet in this respect of the utmost value. The necessity for giving a plausible reason for every new item of expense is a hindrance to new and unnecessary claims that keeps within limits the natural tendency to increase, and checks the wastes so common in public economy. In the United States it has not been the habit of financial officials to make such use of their opportunity. Yet it might be made part of their accustomed work.

In California the general appropriation bill is prepared by the State Comptroller and a Board of Control. The Comptroller exercises more than a ministerial function, for he goes over the department estimates carefully and tries to comply with the demands as far as possible without recommending an exorbitant expenditure. Officers having this title are provided for by eight of the State Constitutions and are found at Washington. The simpler spelling, "Controller," might suggest that they could happily be entrusted with critical supervision, but on second thought it will be evident that skill in examining and certifying accounts, the ordinary work of Controllers and of Auditors, does not necessarily imply any capacity to exercise judgment. Therein, as I observed in the preceding chapter, lies the objection to putting the work on any one of the officials with whom we have been familiar in matters of administration, or in joining several of them on such Boards as have been created in various States. These men have not been elected or appointed with a view to the peculiar and exacting duties that a budget-maker should perform. Furthermore the members of the administrative family are the last persons in the State likely to look with a critical eye on each other's desires, or to refuse the desires of those with whom they come in intimate daily contact.

Where no proper official exists, why not create one? That was what Massachusetts did. After four years of experience with a Commission on Economy and Efficiency, that body was replaced, in 1916, with a Supervisor of Administration. Under the budget amendment to the Constitution adopted in 1918, it was expected that this official would become the real maker of the budget of Massachusetts.

The idea was embodied in the budget bill passed by Congress in 1920, vetoed by President Wilson, and signed by President Harding. House and Senate differed for a time as to whether the official censor (as he might appropriately have been designated) should be in the Treasury Department or be independent of all Departments and reporting directly to the President, but on this point the conferees reached a compromise. The significant thing was the decision of Congress that there should be some adverse agency to scrutinize every estimate that is made, with discretion to recommend to the President that estimates be cut down.

The system has worked admirably. Indeed, so far as it goes,

no chance for improvement suggests itself All along the line, from the budget committee in the Departments, through the Budget Officer of the Department, then the Secretary, then the assistants in the Budget Bureau, to the Director of the Budget himself, economy has been stimulated. Opportunity to travel for some weeks in company with one of the assistants to the Director, inspecting governmental activities of one of the Departments, showed me that he was master of his field, sound of judgment, sympathetic and yet properly censorious, without fear or favor. Having study of needs his constant work throughout the year, he had a familiarity with departmental details no member of the legislative branch would have the time or opportunity to acquire His advice greatly helped

#### CONSIDERATION BY COMMITTEES

However the financial proposals get before the lawmaking body, whether in one document known as a budget, or piecemeal after the method so long customary in the United States, the next step is their consideration by legislative committee.

Here the vital difference between English and American procedure is that whereas each system contemplates particular study prior to the final discussion by the legislative body, in England this particular and detailed study is left wholly to the executive branch of government, the ministry and its agencies, but in the United States it is performed by small standing committees, whether or not there has also been study by the administrative agencies or the Executive himself

The variations in the American practice are numerous and intricate Let broad classification here suffice. It will follow two lines First, the work of particular study may be performed by one committee, or it may be divided between two, three, several, or many committees, secondly, it may be performed but once, or it may be performed twice, or even three times

The history of the allotment of the work is a history of subdivision of labor This may be illustrated by the development in Congress Up to the Civil War period the Committee on Ways and Means had jurisdiction of all the finances, including both the revenue and appropriation bills, as well as general oversight of the debt and of the departments of the Government. The burden became too heavy and in 1865 it was divided be-

tween three committees, that on Ways and Means, a newly created committee to take charge of Appropriations, and another newly created to take charge of Banking and Currency. In 1876 the load of the Committee on Appropriations was unbearably increased by a change in the rules declaring any general legislation that was germane to a bill to be in order if retrenching expenditure. This made it quite impossible for the members of the committee to devote attention enough to the details of the appropriations proper. To the evident need of relief came the help of that hostility toward an Appropriations Committee which its economies inevitably breed. Reagan of Texas made the first inroad by getting the House to suspend the rules and pass the River and Harbor Bill without referring it to the Committee on Appropriations. Next, in 1880, the Committee on Agriculture freed itself from revision. Then, in 1885, after a spirited contest springing out of personal and factional animosities six more of the general bills were taken away from the watch-dogs of the Treasury, and distributed among other committees.

This process did not go on without earnest remonstrance. George F. Hoar, writing in the "North American Review" for February, 1879, urged return to the single committee control, and James A. Garfield in the issue of the same periodical for the following June declared it to be "of the first importance that one strong, intelligent committee should have supervision of the whole work of drafting and putting in shape the bills for the appropriation of public money." He argued for a budget, covering both expenditure and revenue. Yet when in the following year the Committee on Rules advised returning the River and Harbor Bill to the Committee of Appropriations, the House refused.

A generation of experience with sub-division did not diminish criticism. As typical of the conclusions reached by sundry thoughtful Representatives, may be cited those of Samuel W. McCall. "It would probably be better," he wrote, "if all the supply bills came from a single committee. Expenditure would thus be better proportioned between the departments of the government, and to the revenue as well; experience with many bills would produce a more capable body of men, and the danger also would be averted which has more than once been hinted at — that a committee with a single bill might attempt

to increase its own importance by augmenting the size of its appropriation " <sup>1</sup>

Opinion of this sort gained strength with the spread of the budget program. Reiteration of the argument led the reformers to believe that real economy would not be possible without concentrating the work of appropriation in one committee. So when the Budget bill passed the national House in the spring of 1920, the rules were changed to restore to the Committee on Appropriations seven big bills of which it had been robbed. Plans miscarried, for the President vetoed the Budget bill, but the changes in the rules survived. With the opening of the next session the membership of the committee was enlarged from 21 to 35, by transfer of members from the committees that had lost the appropriating function. Out of the full committee were formed sub-committees, each of five members, to a number so that nearly every man was on two sub-committees—which is not without objections. Each sub-committee took charge of one bill.

Naturally the old committees that were shorn of power, resented all this and prepared for what looked like revenge, although they themselves protested that they sought only to prove the change had been unwise. For many years various items of appropriation, originally permitted by general consent or begun by the Senate, had been carried along without any basis of law. They were always subject to being thrown out on points of order and now the offended members began making trouble by taking merciless advantage of this opportunity. They riddled various bills in this way.

The debate brought out the charge that the sub-committees of the Committee on Appropriations had often worked with only two members present, and that the result of their labors had been accepted by the full committee with but a few minutes of consideration. Clearly therein lies much danger. It is imprudent to have but two or three men virtually determine how millions of dollars shall be spent in any one field of government activity. They may be exceptionally able, earnest, sincere, and yet be swayed unconsciously by prejudice or zeal. Appreciating this, not a few of the more thoughtful members of the House watched the first workings of the experiment with grave anxiety, and came away with doubt as to whether the best solution of the problem had been reached.

<sup>1</sup> *The Business of Congress*, 19

Surely it is a difficult problem, and of a seriousness held to be great by some of the men who have had the best chance to judge. For example, Chairman Tawney of the Committee on Appropriations recalled in 1909 that when Mr. Randall and Mr. Cannon fought sub-division in the 44th Congress, they predicted it would cost the people of the United States not less than \$50,000,000 a year, and Mr. Tawney declared they had not been far out of the way. Another Chairman of Appropriations, John J. Fitzgerald, talked in like figures to a committee of the New York Constitutional Convention, May 26, 1915. "I undertake to say that without any trouble at all, if there had only been half a chance, in the sixteen years I have been in Congress, the government could have been as well conducted for from fifty to one hundred million dollars less than it has been conducted for" <sup>1</sup>

Observe, however, that both Mr. Tawney and Mr. Fitzgerald had become accustomed by their official duties to look on the prevention of expenditure as the paramount consideration. Normally, naturally, fortunately, the Chairman of a Committee on Appropriations gets into the unvarying habit of asking first, "Can this be avoided?" — not, "Is this desirable?" I speak by the book for I have occupied such a position, in a State Legislature, with judgment to pass on twenty millions or so of public outlay. It was long before I could readjust myself and resume giving equal weight to the two questions.

Mr. Fitzgerald's averment implies from fifty to a hundred million dollars of actual waste, and Mr. Tawney undoubtedly meant the same thing when he spoke of "cost." The belief in such extravagance is widespread. It found expression in President Wilson's address to Congress, December 3, 1917, when he expressed the opinion that it would be impossible to deal in any way but a very wasteful and extravagant fashion with the enormous appropriations due to the war, unless the House would consent to return to its former practice of initiating and preparing all appropriation bills through a single committee, "in order that responsibility may be centred, expenditures standardized and made uniform, and waste and duplication as much as possible avoided."

There can be no question that extravagance, great extravagance, blemishes the conduct of our public affairs, both of the

<sup>1</sup> *N Y Convention Doc 15, p 12*

Nation and of the States. Yet it is far from proved that the spreading of committee scrutiny has been the chief cause, or even a relatively important cause. On the other hand there was real reason to fear that if the labor were not sub-divided, its growing weight would crush a single committee by putting the adequate consideration of details beyond the range of physical and mental capacity.

Of the purposes Mr. Wilson advanced for abandoning sub-division, that of securing "responsibility" would in practical effect amount to little or nothing; something might be gained through standardizing expenditures and preventing duplication, the serious causes of waste would not be reached. Government is really what many persons call wasteful, because the people approve giving to those who work for it a larger day's pay for a shorter day's work than is habitual in private occupation, because the conditions of government employment conduce to a low standard of efficiency, and because we have a civil service often not intelligently selected and trained. The objects of the expenditure are rarely to be charged with the waste, the methods are guilty.

Sub-division of committee work, almost imperative, can bring all its manifest advantages without losing the benefits of centralization whenever a lawmaking body sees fit to apply a method already tested and found efficacious in its essential principles by at least half a dozen States. Under this method the recommendation of an originating committee must be approved by a ratifying committee before it will be discussed in the legislative chamber.

For illustration take the course of a proposal in Massachusetts to build a new normal school. If it is not included in the Governor's budget, the petition with bill goes to the Committee on Education, which will hold hearings and if satisfied of the need, will report a bill. Since this involves an expenditure of public money, under the rule it goes automatically, without discussion in the chamber, to the Committee on Ways and Means — for so, quite inaccurately, has come to be named what is really an Appropriations Committee. If this committee makes an unfavorable report, then the two committees cross swords on the floor of the House, in a combat likely to be most helpful to the membership, for neither side has an undue advantage and decision upon real merit may generally be had. If the Com-

mittee on Education wins, or if the two committees have agreed and no minority objectors have prevailed, in the House itself the measure goes next to the Committee on Ways and Means in the Senate for consideration and report, save occasionally when the Senate and House Committees on Ways and Means have sat jointly (The Committee on Education, being a joint committee, of course need not be consulted again) This, it will be seen, usually gives three separate committee inquiries

Since the budget system has been adopted in Massachusetts, use of this program has been less common, for if such a matter as a proposal for a new normal school is included in the budget, it goes with the rest to the Committee on Ways and Means, which passes on the matter without preliminary study by the Committee on Education — a change for the worse, in my judgment Furthermore the Senate and House Committees on Ways and Means have handled the budget in joint session, thus reducing scrutiny from that by three committees to that by one—to my mind a regrettable loss However, taking such use of the old system as survives, let us contrast it with the Congressional method To make clear the significance of the differences, and thereby expose the nature of the problem as a whole, first analyze the appropriating process This will be found to concern one or both of two classes of expenditure. (1) for capital outlay (whether original or supplementary investment), and (2) for maintenance (whether of works or of service) Each of these classes calls for two kinds of decision—one concerned with the merits of the proposal, the other with the details of its execution

In Massachusetts, by the old method, the wisdom of capital outlay was passed upon both by the specialized committee (Education, Roads and Bridges, or whatever it might be) and, if the specialized committee approved, by the centralized committee (Ways and Means) Congress ostensibly requires these two approvals in the case of original investment, but steps in between them with the process of enacting a statute, thus putting upon the centralized committee the awkward task of determining whether law shall be executed In the case of original investment this rarely arouses any such conflict on the floor as in the past was frequently seen in the Massachusetts House, perhaps because nothing compels a Congressional Committee on Appropriations to make a report if it disapproves executing



a project. Supplementary investment causes more trouble in Washington because the appropriating committee may try to slip it through by putting it in an omnibus bill when there has been no statutory authorization. If it escapes attention, or if it avoids a point of order by reason of debate on it having begun before the point is made, it may get by and thus save the delay and danger of trying to have a law duly enacted. I never knew anything of the sort to take place under the Massachusetts system

Matters of maintenance are harder to discriminate, for merit and detail merge into each other and are often hopelessly confused. To the extent that the original statute specifies detail, both in Congress and in the Massachusetts General Court, execution is entrusted to the centralized committee, with sundry exceptions that need not here concern us. In this respect improvement seems to me possible and desirable. In my opinion gain would come if all phases of maintenance were, like capital outlay, passed upon by both committees. The trouble now is, at any rate in Congress, that an appropriating committee is sorely tempted to pass original judgment on merit as well as detail. The result has been a great mass of legislation attached to appropriation bills, as well as the inclusion of many items originally without authorization of law and afterward repeated annually as a matter of course.

Stringent rules have been unable to prevent much of this. Their most palpable result has been merely to create a maze of rulings in which all but a few of the most expert parliamentarians find themselves hopelessly lost. If an item comes to grief in the House by reason of a point of order, the chances are it will be reinserted in the Senate, where rules hamper less. Of old it would probably have been accepted by the House conference, and then by the House, forced to vote on the conference report in the mass. A change in the rules, made as part of the budget program, now permits a separate vote in the House on conference items that would not have been in order in the House. This has bettered the situation somewhat, but not greatly.

An illustration of the defects of the system as it has functioned was brought out in the debate on the Indian bill, January 15, 1921, when M. Clyde Kelly of Pennsylvania showed that the appropriation, which in 1850 had been \$500,000, had grown until for 1921 it carried \$12,000,000, "the greater part of which

was never authorized by Congress and would never have been authorized by Congress if specific authority had been up for decision." He meant that if for each step in the process the friends of the Indian Bureau had been required to ask for statutory authorization before the appropriating of money, the greater part of the requests would never have been granted. Perhaps this had a strain of oratorical hyperbole, but Mr. Kelly may have been not far out of the way.

Double committee scrutiny has the great advantage of independently utilizing two points of view. The specialized committee asks — "Ought we to have it?" The centralized committee asks — "Can we afford it?"

That second question — "Can we afford it?" — is what the budget reformers think of most, with the subsidiary question of economy in execution. There is nothing in their program inconsistent with the double scrutiny system. Nothing stands in the way of having the budget split up for reference to the various specialized committees concerned and then brought together in the centralized committee for revision and co-ordination. Does it not stand to reason that such reiterated inquiry is more likely to disclose merits and demerits than that to which an English Cabinet Minister is exposed when he stands ready to be questioned on any given item as it is reached in traveling through a long budget bill? Remember, too, that on top of investigation by three committees, and examination by House and Senate, must come inquiry by the Executive before he signs. Is it sure that on the whole this is not a more safe and conservative procedure than that of Parliament?

Singularly enough, while we have been copying the budget system from England, while Congress has been working to concentrate committee control of finance, Parliament has been looking in precisely the opposite direction. Indeed it might almost be said that Congress and Parliament contemplated exchanging systems. J A R Marriott, who discusses Parliamentary matters thoughtfully, declared in the "Nineteenth Century" for August, 1917, that the estimates should be closely scrutinized by a committee or by a series of committees — one for each class of votes. Sidney Webb proposed to the Select Committee on National Expenditure which reported in 1918, that there should be appointed a standing committee for each of the thirteen great divisions of government. The Select Committee

was not prepared to sub-divide the work so much, but it did advise the appointment of two standing committees on estimates, of fifteen members each, and said that after some experience it might be found desirable to add a third. The alternative of a single committee with larger membership was considered and disapproved. Of course this did not go to anywhere near the length of the American system, but it showed the tendency of English thought.

Some of the criticisms aimed at the process of scrutiny by standing committees seem to me justified only by the course of affairs in certain Legislatures that would make a mess of any kind of procedural machinery. For example, former Governor J. F. Fort of New Jersey told the Economic Club of Boston November 29, 1915, that in his State the joint Appropriation Committee brought in the tax acts on the last day of the session, when it was to be adjourned at three in the afternoon, with the result that nobody except the committee read them. What possible form of salvation is there for a Legislature incapable of preventing that sort of thing? Again, it is charged that committee meetings are held in secret, thus shielding from public observation the examination of officials or petitioners. Such is not the case in Massachusetts and it is to be hoped that presently good sense will lead every legislative body to require public committee hearings. It is true that under the English system there is always the chance for public questioning of the member of the Government in charge, on the floor of the House, and it may be that this mode of eliciting information is preferable to a committee hearing which no large part of other members or the public can attend, but on the whole the public committee hearing seems to me the better recourse.

It is said that committees are irresponsible, by which is presumably meant that they cannot be punished for bad advice. That is true, and perhaps it is the worst feature of the committee system in practical result, for a legislative body must put a good deal of confidence in its committees or otherwise there would be slight advantage in having them. There is, however, the same safeguard that is in principle one of the best features of the budget system itself, the safeguard given by the opportunity for criticism. Every committee knows there is at least a chance that its work may be questioned and riddled. Nobody likes the humiliation of defeat, and committee members

have just as much pride as anybody else. Also there is a committee pride, an *esprit du corps*, that plays no small part in legislative processes. Each committee is as anxious to succeed, as mortified by disapproval, as jealous of its record, as would be a British Cabinet. Furthermore the individual committee member feels at least as much responsibility to his own conscience as he would if his only share in scrutiny was that given by consideration of a proposal in Committee of the Whole. Indeed, the sense of personal responsibility is usually heightened by the trust imposed under the committee system. The public greatly underrates the fidelity and probity of legislative committees. After serving on not a few, I recall none where the greater part of the members did not take their work seriously and try earnestly to form the best judgments of which they were capable.

Critics who grant good intentions to committees, yet say that they are not adequately informed. It is true that the conditions under which committees work, prevent exhaustive investigation, but if such study as may be feasible is supplementary to that which has been given by the administrative agency submitting the estimate, do not the chances favor its helpfulness? The criticism holds only in the case of proposals originating by petition from the outside or upon the initiative of a Representative or Senator. This situation can and should be met by an ironclad rule, or indeed by a constitutional provision, that action shall not be taken on any measure involving the expenditure of money until it has been reported upon by the administrative agency, if any, concerned with the subject matter thereof. In the best regulated Legislatures, custom already secures this in many cases, but everywhere it ought to be made unavoidable. The State in effect maintains at large expense a corps of experts acquainted with nearly every field of governmental activity. How absurd to refrain from profiting by their knowledge!

The complaint that committees do not work with any regard to harmony and symmetry, is met partly at any rate by the practice of having all appropriation bills either come from one committee or get its approval, though as a matter of fact in the working out the occasion to harmonize proves to be small and symmetry proves to be rarely practicable or desirable. Not even does it appear that much need has been felt for combining

the study of revenue and expenditure. In Wisconsin the joint Committee on Finance is to consider not only all bills requiring appropriation, but also all providing for revenue or relating to taxation, and there may be other States where a like purpose to correlate may be found, but for the most part taxation methods and measures are dealt with by a quite independent committee. This is feasible and harmless in the States because of the general use of the direct tax on property, easily adjusted to complement the income from other sources and approximately balance the expenditure. With the Nation, however, forbidden as it is by the Constitution to impose such a tax save on the population basis, the situation is different, and theory might well predict trouble from the independent work of Committees on Appropriations and on Ways and Means. Yet in half a century and more no great harm has come, even with the addition of the income tax and the fluctuation of its product. Everybody has a general idea of the financial situation, and so far as there may be need of co-ordination it seems to be secured informally to a degree enough for practical purposes.

A minor criticism is that subordinates in executive departments can approach committees and secure favors or unduly advance the interests of their offices. This practice can be kept within bounds whenever heads of Departments or Chief Executives deem the evil serious enough to call for orders forbidding their subordinates to communicate directly with committees. Individual lobbying would still be possible but of no great consequence.

Independent inquiry by several committees is a time-taking process and is of course inconsistent with the theory prevailing in many States, that it is dangerous to give a Legislature time to do its work properly. Where sessions are not limited and salary is adequate, there is no reason why the system should not be adopted with as much benefit as in those of the States that it already profits. Regarding these I may from personal experience testify only as to Massachusetts. Surely there the system has been found salutary. Perhaps it will be retorted that the processes of few other States are as orderly and as well safe-guarded as those of Massachusetts, that the forces of tradition and exceptional self-respect keep her in righteous ways; that elsewhere specialized committees cannot be trusted to have anything whatever to do with appropriations. It is true

that in States having a lower legislative morale, the substitution of different machinery would not of itself create higher standards of public service. All that machinery can do is to help honorable men to prevail. The question is — What machinery will do that best? If the budget feature of the Cabinet system will most hamper the boss or the grafter, the selfish or the venal, that alone would go far toward its justification, but balancing losses and gains, and judging by actual experience, it seems to me the double-scrutiny committee system promises most. Better still may be the combination of the two systems we are developing.

#### METHODS OF TREATMENT

A natural though not necessary result of the committee system is the consideration of financial proposals more or less independently of each other by the legislative body itself. Rules and customs in this particular greatly differ, and the matter is further complicated by distinction between measures authorizing or directing appropriation and measures actually appropriating. Avoiding the confusion into which we should be brought by attempt to examine differences of detail, let it be understood that in general three methods contend for favor. One may be called the piecemeal method, another, the group method, the third, the budget method.

The piecemeal method, that of treating each proposal by itself and letting every tub stand on its own bottom, grew naturally out of colonial conditions. It was quite harmless and adequate in the days when appropriations were few and small. This system has not been without defenders in spite of the onrush by the budget champions. As experienced and judicious an observer as C. McCarthy, of the Wisconsin Legislative Reference Bureau, said that in his State "each bill must be considered on its merits, fought over and either killed or passed," and "nothing could be more desirable, if at each stage the members have before them a statement of the actual finances of the State."<sup>1</sup> Singularly enough, Mr. McCarthy defended the system on the very ground chosen for one of the most serious criticisms made by the advocates of its abandonment, for the reformers said the budget would lessen log-rolling, whereas Mr. McCarthy, as a result of "a thorough investigation of the

<sup>1</sup> *The Wisconsin Idea*, 202.

procedure in other States and some first hand knowledge of such procedure in foreign countries," said, "the budget bill is considered unwise [in part] because it includes so much that is a fruitful source of log-rolling "

Under the group system may be classed the States that to a material degree combine in one or more large bills various proposals for expenditure, but do not put everything in a single bill. Many of them put in a "general appropriation bill" the provisions for the ordinary legislative, executive, and judicial services of the government, some specifying that other matters shall be attended to by separate bills, each embracing but one subject, some handling other matters in supplementary bills. In three or four States a few large bills have been the custom. This is the practice in Congress. There the development has been away from the single bill, in just the opposite direction from that which the budget advocates urged. For the first forty years of our national history the appropriations were commonly made in one Act. In 1823 those for fortifications were put in a separate bill, in 1826 those for pensions, and in 1828 a River and Harbor bill appeared, by 1847 there were nine bills, and after 1862 a dozen. There are now nine big appropriation bills. In addition there are the various relief acts making special appropriations, and certain appropriations authorized by general statute, such as interest and sinking fund charges, that do not appear in the general bills.

The budget system does not necessarily put all financial proposals into one bill. For instance, as embodied in the Massachusetts Constitution by amendment adopted in 1918, though requiring the Governor to submit a general appropriation bill, the system permits him to recommend supplementary budgets, and authorizes the enactment of special appropriation bills. The English tendency, however, has been toward complete consolidation. A memorable controversy in 1860 brought the matter to a head. A bill for repealing the duty on paper formed part of the financial proposals of the year. The loss of revenue expected from this and other duties was to be met by an increase in the income tax. The income tax bill passed both Houses; the paper duty repeal bill, after narrowly escaping defeat in the Commons, was rejected by the Lords. Marriott recalls<sup>1</sup> that to no one did this action of the Lords give greater

<sup>1</sup> *Second Chambers*, 68 *et seq*

satisfaction than to the Prime Minister, Lord Palmerston, who did not approve of the repeal of the duty on paper, but his Chancellor of the Exchequer, Mr Gladstone, was of a different mind, and compelled Palmerston to submit to the House of Commons, though with very ill grace, a series of resolutions reasserting in the strongest terms the privileges of the Commons in regard to taxation. At the next session Gladstone had his revenge on the Lords, for he embodied all the financial proposals of the year, including the rejected paper duty repeal bill, in a single bill, and challenged the House of Lords to accept it or reject it as a whole. It was a bold challenge. But it was justified by success, and set a precedent from which there has been no departure from that day to this.

The great advantage of the English plan lies in its being orderly and comprehensive. All the members of Parliament know in good season what they are to pass upon and it is contemplated that they shall do the work systematically. After the Speech from the Throne at the opening of the session has disclosed the demands of the Government, a day is fixed for meeting as a Committee of the Whole to vote the supplies, and another to agree upon how the revenue shall be raised. With a printed list of all the estimates in hand, completely itemized, the members have fully two months to ask questions and inform themselves.

In the theory of such a system there are manifest benefits. It can prevent surprise; nobody may allege that he was caught napping. It can give the newspapers or public-spirited citizens who care to interest themselves, chance to criticize beforehand, instead of afterward as under the American plan. It can aid the legislative sense of proportion to whatever degree may be practicable. It can prevent postponing to the hurried and crowded days of the close of the session what may be its most important work, thus lessening the chance of "jokers," raids on the treasury, schemes prompted by self-interest. Unfortunately, however, it is not the case that the system is so treated in Parliament that the results as a whole are palpably superior to those of the American procedure. One trouble is that the earlier items are permitted to get more than their share of discussion, so that when debate must end, because the time allotted has been consumed, estimates amounting to millions of pounds are not debated at all. Also criticism is made on the ground that the budget



statement is ill adapted for disclosing the true financial position of the country, very few persons being able to find their way through its devious passages<sup>1</sup> All votes on the budget still involve the fate of the government, and it is said that under this system desirable changes in the budget and effective control by Parliament are in practice eliminated.

Those who yet defend the American piecemeal system declare that because a budget bill contains so much, members will be averse to considering it patiently item by item, but will yield to the temptation to accept it as a whole without thorough scrutiny. Should we rely on conclusions drawn from Congressional experience, where the general appropriation bills are bulky and formidable, this objection would have little weight, for advantage is freely taken of the opportunity that ordinarily each member has to question and debate under the five-minute rule in Committee of the Whole. Many hours of many days are given to discussing the great measures clause by clause and item by item.

The contrast to this presented by the New York Legislature in its first experiments with a budget shows once more that custom is more powerful than machinery. When the session of 1917 opened, each member found on his desk four thick books and a pamphlet containing all told 2767 pages of dollar signs, digits, and printed matter.<sup>2</sup> These he might have studied to his heart's content in the ten weeks before the general appropriation bill was reported by the committee, and in the next fortnight or so that the bill was before Senate and House he might have prepared himself for criticism of the committee recommendations. Yet in the Assembly the only discussion was by the leaders of majority and minority and the Chairman of the Committee on Ways and Means, and the whole debate took but two hours and six minutes. The Senate gave half an hour to ordering the bill to a third reading and on the next stage debated it for an hour. This was all the open discussion secured for a bill appropriating nearly \$50,000,000.

The criticism was almost wholly perfunctory. Everybody knew the bill would go through virtually as reported by the committee. Party exigencies called for nothing but an appearance of fault-finding by the minority. That this was more

<sup>1</sup> James K. Pollock, *Am. Pol. Science Review*, August, 1931, p. 688.

<sup>2</sup> *Municipal Research*, June, 1917, p. 53.

than a pretense, will be doubted by anybody familiar with American politics and American legislative bodies. President Taft would not even grant sincerity to the contests in Congress. He told a committee of the New York Convention of 1915 that "when the leaders of the House — the leader of the House and the leader of the opposition, or, rather, the Appropriation Committee, get up to explain on the one hand how economical they have been, and on the other hand how extravagant they have been, everyone who hears them knows in his heart that both speeches are buncombe, because in most of the extravagant estimates, both parties are responsible. It is so with the River and Harbor Bill, and it is so with the Public Buildings Bill; it is so with the Sundry Civil Bill, and there are roses that grow over the party wall in their respective appropriations" <sup>1</sup>

It is to be suspected that in this declaration Mr Taft was somewhat rhetorical. Probably on reflection he would have made it more clear that he was questioning partisan pretense as to aggregates rather than individual attitude toward items. It would be most unfair to allege insincerity in the great mass of the attack upon details made in Committee of the Whole, and far more of the defense of these details is really public-spirited, than uninformed critics would have the public suppose. Furthermore, with the concentration of all appropriating in one committee has come even less of partisan treatment by Congress. There as in Parliament though the growing pressure of business is compelling limitation, the discussion of details goes on vigorously and usefully. The differences between the two show of themselves that the form in which the program comes, is not the predominating factor in determining its treatment. Few changes are made in an English budget apart from those that upon discussion commend themselves to the Ministry. Indeed, if any serious changes were made against its will it would resign. In Congress there is without regard to party lines far more criticism actually having effect in the way of change.

It must, however, be recognized that anywhere either the one-bill or the big-bill practice may encourage party action. Whether proposed by an Executive who has been chosen with partisanship uppermost, or made up under the control of party leaders within or without the legislative body, a program

<sup>1</sup> *N Y Convention Doc No 11, p 25*

embodied in one bill or a few bills is likely to be made a test of party loyalty, easily discouraging or virtually preventing independent opposition to details. That is most undesirable in matters of finance.

It is not without significance that when the framers of the Constitution for the Australian Commonwealth came to profit not only by the long experience of the mother country, but also by that of many other nations, they made an omnibus budget impossible by providing that "laws imposing taxation, except laws imposing duties of customs or excise, shall deal with one subject of taxation only." This, if it covers outlay as well as income, may encourage those who, while admitting that the ordinary expenses of government may very well be passed upon in one bill, hold that anything essentially novel and of consequence, especially if it involves embarking on a new policy, should be treated by itself.

Proper and reasonable opportunity for considering appropriations is one of the most admirable features of the budget program. In many States it has been the habit to delay no small part of this work until near the close of the session, not commonly with sinister purpose as the muckrakers would have us believe, but in part because of a tendency to dispose of the less important matters first, in part because of a not improper wish to give all the time possible to the study of big problems, and in part because the Legislature had to make much of the investigation and study of which it has been at least in part relieved where the executive branch has taken that over. Before the budget was widely advocated, some of the States had provided against the difficulties and dangers of handling appropriations in the closing days of the session. Louisiana in 1879 had said that no appropriation made in the last five days should be valid. New York sought to accomplish the same end by requiring, in 1894, that all bills should be printed and on the desks of members three days before adjournment, but this was marred by permitting the Governor to clude the rule with an emergency message, an expedient he proved not unwilling to bring to the help of a dilatory Assembly. Several States try to get adequate consideration by limiting the time within which appropriation bills shall be introduced. Thus North Dakota forbids the introduction of such bills, except for the expenses of government, after the fortieth day of the session, unless by

unanimous consent and the Nebraska provision has the same effect. Montana and New Mexico make the prohibition cover the last ten days of the session, Wyoming the last five.

How far the financial measures should get precedence, is a kindred problem. As early as 1835 the national House of Representatives saw the necessity of putting the support of government ahead of everything else, and in 1837 it adopted the rule establishing the principle ever since prevailing, that the consideration of revenue and appropriation bills is a matter of high privilege. At any time after the reading of the Journal, by direction of the appropriate committee it is in order to move that the House resolve itself into Committee of the Whole House on the state of the Union for considering such bills. Of the States, Mississippi has gone farthest in this direction by prescribing in her Constitution of 1890 that "appropriation and revenue bills shall, at regular sessions of the Legislature, have precedence in both Houses over all other business."

Proper sequence of treatment was sought by Missouri in 1875 when it specified seven kinds of appropriations that must be made in the order named, and before any others. This goes much farther than the approved budget program, which merely requires that the executive recommendation shall have the right of way. Such is the effect of the budget provisions in the amendments adopted by Maryland and Massachusetts, and the reasonableness of a schedule securing this will doubtless make it common.

## CHAPTER XIV

### THE COURSE OF APPROPRIATION

THE problem of precedence in the fiscal relations between the two Houses, has played no small part in the history of representative government.

For years after the creation of Parliament, grants might be made to the King by Lords and Commons without communication between them, each Estate giving what it saw fit. Finding it wiser to act in harmony when negotiating with their common enemy, the Crown, they got in the way of making their offer either upon deliberation had together, as they expressed it, or by the successive determination that was to become the universal practice of bi-cameral legislatures. Just why, how, or when Commons won precedence, is uncertain. We know, however, that under Richard II it began to be said the Commons granted with the assent of the Lords.

Well-nigh three centuries passed before the fruition of the principle was complete. Although in the first Parliament of Charles I the Commons began to omit the name of the Lords from the preamble of bills of supply, it was not until the reign of the second Charles that the prerogative of the lower branch was made clear and definite by its extension to cover all aspects of taxation. When in April of 1671 the Lords reduced the duty on sugar and argued that in so doing they did not grant supplies, but withheld them, it was resolved by the other House "that, in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords." This brought on discussions lasting through several years, and as late as 1696 a vigorous pamphlet defending the right of the Lords to alter money bills, though not to increase the rates, shows that the topic still had an academic life, but in practical effect the Commons had won the fight for the management of the revenue.

The men who founded the early American colonies brought with them the conception of the rights of Englishmen that the Puritans established in their struggles with the Stuarts and the House of Lords. Hardly had the first Assembly been created in Virginia, when it asserted its right to control the purse. In

1624 it forbade the Governor to levy any tax or impost on land or commodities without its consent, and provided that when such a tax should be collected, it should be expended only as appropriated by the House. Wherever in the colonies the upper branch of the legislative body was distinctly aristocratic or looked on as not broadly representative, the right of the lower branch to originate measures of taxation was likely to be asserted. Thus the Virginia Burgesses almost from the start insisted on their prerogative in framing money bills. To be sure, in 1661, when the news from England about the Restoration had given democracy a setback, a bill was passed empowering the Governor and Council to make an annual levy for three years, to save the cost of convening the Assembly, but when that period had elapsed the representatives of the people plucked up their courage again and, in 1666, rejected the suggestion of the Governor that two of the Council might join with the House in granting and confirming the sums of the levy.<sup>1</sup> Afterward five Governors were instructed by the home government to see that the Assembly should repeat the enactment of 1661, for the same reason, to avoid expense, but the Assembly stubbornly refused to yield a jot of its prerogative, even in cases of emergency. On the other hand, when the accession of William and Mary aroused hope of more liberal treatment, the Burgesses asked their agent in London to get specific recognition of their exclusive right to levy taxes, but this was not in so many words granted.

Four years after New Hampshire began independent existence as a province, the Representatives rejected as "unparliamentary" a money bill that had been sent down by the Council. The next day Governor Wentworth dissolved the Assembly and tried to levy taxes on his own authority. Failing in this, he summoned another Assembly, six months later, which likewise was insubordinate and was dismissed after a short session. From that time the right to originate money bills was never relinquished by the lower House.

In Massachusetts no question appears to have arisen while the Assistants or Magistrates composing the upper branch were viewed as completely within the control of the people, but when with the charter of 1691 the Governor came to be named by the Crown, his Council, though elected by the General Court, fell

<sup>1</sup> Hening, *Statutes at Large*, II, 254.

under suspicion of royal influence, the lower branch came to be looked upon as the defender of popular liberties, and what was supposed to be one of the bulwarks thereof, the right to originate money bills, was pre-empted by the Representatives. In 1753 the House sent up a message in which it said. "The Honorable Board cannot but know that all grants of money and taxes must originate with the House." To this the Council replied "The right of the House to originate all taxes and grants of money has never been disputed by the Board."

The contest was more vigorous in New York. There the issue was joined in 1704, when the Council tried to amend a supply bill. The Assembly paid no attention to the amendment and sent the bill back. At the second session the dispute resulted in a deadlock that lasted three weeks and was ended by dissolution. The Assembly resolved that it was "inconvenient" for the Council to amend. In 1711 the Assembly was so punctilious as to object to a Council amendment leaving out the word "Treasurer" and making certain duties and taxes payable to the Receiver-General. It declared that sundry amendments accepted in former times were "condescensions," and not to be taken as precedents. The dispute went on for forty years and more, the Board of Trade vainly trying to uphold the Council, the Assembly holding its ground, until after 1754 the Council silently yielded, no longer trying to amend. Likewise the question was raised in Pennsylvania, New Jersey, Maryland, and South Carolina, the elected Assemblies successfully contending against the appointed Councils.

So when colonies became independent, it was the belief in most of them that the popular branch should control public income and outgo, and it was a wholly natural step for them to put the doctrine into their new Constitutions. Bryce thought it a curious instance of the wish that animated them to reproduce the details of the English Constitutions which had been deemed bulwarks of liberty. Such may have been the wish chiefly put into words by the orators, but it was not the prime and the practical reason, unless liberty means having one's own way. What the provincials wanted was to coerce the representatives of the Crown. Withholding supplies, they could bargain with the Governor. The power to give or refuse money was the club ever held over his head. Even his salary depended on yielding to their demands. Thus they could and did force

him to assent to forbidden legislation. Designating by name in their appropriation bills who should do this or that thing, they virtually compelled appointments to their taste. Assigning administrative tasks to their own committees, they to that extent usurped executive powers.

You may find this aspect of the conditions that led to the Revolution excellently brought out by O. M. Dickerson, in his "American Colonial Government." There he makes it clear how it was that by 1765 the Councils had been robbed of their chief legislative powers, judges and other officers had become dependent upon the lower House, and the Governors had been reduced to inefficient figureheads, dependent upon the Assemblies for their daily bread, and impotent to obey the orders they received from England. Surely something may be said for the unhappy Governors, even if it be with rejoicing that by using advantage without mercy the Assemblies forced the home government to the retaliatory measures that in turn led to Independence.

For us, however, the important thing at the moment is to realize that as a result of experience the men who wrote the early Constitutions attached great weight to the right of originating money bills in the popular branch. In this they were strengthened by the belief that upper branches would continue to be what they always had been — aristocratic bodies, representing what are nowadays commonly spoken of as "the interests." Indeed, to take but one example, the Senate of Massachusetts was definitely based on the principle of representing property rather than valuation, and so remained for sixty years. Habit still leads us to think of Senates as not being representative of the people at large and we still talk of the "lower" House as "the popular branch." Bryce was right when he pointed out that there is a reason for this in the matter of Congress, inasmuch as the Federal Senate is not representative of equal numbers of citizens, but he was not quite accurate in his impression that such distinction is not to be found in the State Legislatures, for often there is variance in the bases of apportionment of the two bodies, and other factors help to justify the feeling that the "upper" branch is the less representative of the whole citizenship.

Remember, then, it was continuance of doctrine already acclimated rather than fresh imitation of English practice that



appeared in the new-born Constitutions. The first of them, that of New Hampshire (1776), contained this provision. "That all bills, resolves, or votes for raising, levying and collecting money originate in the House of Representatives." South Carolina, the next to organize, said "All money-bills for the support of the government shall originate in the General Assembly," which was the lower branch. Virginia, requiring all laws to originate in the House of Delegates, of course included money bills therein. New Jersey forbade the upper branch to "prepare or alter any money bill — which shall be the privilege of the Assembly." Delaware required money bills for the support of government to originate in the House of Assembly. Maryland and Massachusetts likewise restricted the originating power to the lower branch. Pennsylvania, Georgia, and Vermont, with but one House, had no occasion to refer to the matter at the start. North Carolina and New York were silent on the subject.

It will be seen that when the Federal Convention met, no State having adopted a Constitution had definitely empowered the upper branch to originate a money bill. Yet the wisdom of refusal was not unquestioned. Thus in Virginia the practice must have already been felt irksome, for when Edmund Randolph, speaking for his Virginia colleagues, presented the resolutions that were taken as the basis for discussion in the Convention, they were found to declare that each branch of the legislative body to be created for the nation "ought to possess the right of originating acts," with no exception of those relating to finance. On the first day when the subject was debated, Roger Sherman told the Convention that in his State, Connecticut (still living under its old charter), it had been found safe and convenient for both branches to originate in all cases. Madison, King, and General Pinckney all raised objections to Gerry's motion to restrain the upper branch in this respect.

Thus began a contest renewed again and again through many days and ended only by the great compromise which made the Union possible. For this reason alone, whatever may be the present-day importance of the question, its history should be known.

The struggle was between the smaller States and the larger States. Those with the scantier population fought for equality of representation in the legislative body to be created, just as

had been the case for a dozen years or so under the Confederation. The larger States believed representation ought to be proportionate to population. As Benjamin Franklin put it at the darkest hour of the Convention, when many thought agreement hopeless: "The diversity of opinion turns on two points. If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the larger States say their money will be in danger." Franklin urged a compromise, and it was a compromise that saved the situation, though it did not take precisely the form Franklin suggested. It was worked out by a committee of one from each State, appointed on the next day the Convention sat after the venerable Franklin had paved the way. Two of the wisest members, Madison and Wilson, opposed appointment of the committee. Randolph and Lansing expected little advantage from committing. Luther Martin said no modifications whatever could reconcile the smaller States to the least diminution of their equal sovereignty. Yet General Pinckney, who proposed the committee, Gouverneur Morris, Caleb Strong, Doctor Williamson, and Elbridge Gerry, viewing it as the last hope, persuaded the delegations from nine of the eleven States represented, to consent.

The committee reported what became the basis of the legislative branch — equal representation of the States in the Senate, representation according to numbers in the House of Representatives — and one of the two elements of the bargain, *quid pro quo*, was the right of the lower branch to originate money bills. It was not to be accepted without repeated dispute. At once Gouverneur Morris rose in opposition. "The restriction, if it has any real operation," he declared, "will deprive us of the services of the second branch in digesting and proposing money bills, of which it will be more capable than the first branch. It will take away the responsibility of the second branch, the great security for good behavior." The apprehension implied was the result of his evident expectation that the second branch would be in the nature of another House of Lords, for he had said: "There never was, nor ever will be a civilized society without an aristocracy." His endeavor was to keep it as much as possible from doing mischief.

Colonel Mason was foremost in support of the proposal. Should the Senate "have the power of giving away the people's

money, they might soon forget the source from which they received it." Madison better forecasted the future when he said he could not regard the privilege of originating money bills as any concession on the side of the small States. They seemed to have reached that conclusion, for a month later, by vote of seven States to four, the provision was stricken out of the draft, in spite of Mason's protest that this action "was to unhinge the compromise of which it made a part." Randolph, awake to the danger in which this put the whole programme, the next day gave notice he would move to reconsider, and although when his motion was reached, it was defeated, with the same division of States, wiser counsels prevailed in the conferences of the committee of eleven, and after three weeks or so of informal negotiation that committee reported a further compromise, under which the House should originate but the Senate might amend. This was the solution that in the end prevailed. It is suggested that one purpose was to offset in some measure the special privileges that had been given to the Senate in point of ratifying treaties, trying impeachments, and confirming appointments, but unquestionably the chief intent was to give the House what was meant to be control of the purse strings.

The importance attached to the provision may be further gathered from what was said of it in Number 58 of "The Federalist": "This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any Constitution may arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." That was one of the few instances where the sagacious authors of America's greatest political treatise missed the mark. Rare have been the resorts to the weapon that was to be the most effectual for obtaining redress of every grievance and for carrying into effect every just and salutary measure. Indeed it was quickly recognized as a comparatively ineffective weapon and became one of the few particulars in which the example of the Federal Constitution has not been widely followed. Although Kentucky (1792) restricted to the lower branch the privilege of originating "bills for raising revenue," Tennessee (1796) made no exception to the provision that bills might originate in either House, nor did Ohio (1802). Georgia in 1798, Louisiana in 1812, and Indiana in 1816, provided that money bills should originate

in the lower branch, but Mississippi in 1817 and Illinois in 1818 put the two branches on an equality in this particular. New York definitely declared in 1821 that any bill might originate in either branch, and the greater part of the States now take that ground.

Elsewhere in the world the practice of confining to the lower branch the originating of money bills may still be called general, for the Cabinet system is general. Although it is possible for a Cabinet to have ministers in both branches, it works better when its power is concentrated in one branch, with the other subservient. It must control the lower branch anyhow and it must originate all programmes of finance, so that their introduction in the lower branch is the natural thing. The situation is different from that in our States, where there are no ministers and nothing like ministerial responsibility invites embarrassment from giving equal powers to the two branches.

With us there are but two reasons for differentiating. One is to be found only where the Houses are chosen by constituencies differing in character. In the State Legislatures, however, the variances in this respect are now so unimportant in their effects that by themselves they would furnish no vital cause for continuing the ancient prohibition. In a not brief experience as a member of a lower House in a State where it has a nominal monopoly of originating money bills, part of the time brought in close touch with the matter by membership on the appropriating committee, I saw no instance where the principle involved in the constitutional provision had as a principle the slightest importance.

As a matter of practice, however, there are gains from the differentiation. It is now generally recognized that an orderly financial programme is desirable. This is best secured by initiative in one branch. Otherwise there will be mischievous criss-crossing.

A third reason, advanced by Stephen Leacock, does not much appeal to me. He avers<sup>1</sup> that although in the case of most bills introduced in a legislature no great harm ensues if the proposals of one House are rejected by the other, in the matter of money bills there is a difference, for if no bill is passed for the raising and spending of money, the public service will come to a full stop. To him it therefore seems wiser to make the wishes of one

<sup>1</sup> *Elements of Political Science*, 170

House more or less decisive in the matter, and of the two the House more directly and proportionately representing the people appears to be the natural one to entrust with the power. I do not follow the logic. May there be a *non sequatur*? Under the bicameral system either House can prevent action, save under such exceptional conditions as those now provided for Parliament, whereunder the Commons can in the end get their way. Giving our lower Houses the right to originate, does not make their wishes in any degree decisive. My surmise is that Professor Leacock, living in a Dominion where Senates are relatively unimportant, does not appreciate their standing under the Constitutions of our States. They are here the equal of the lower branches in prestige and power. If the bicameral principle is itself sound, then our State Senates should have equal share in ultimate decision. Only by reason of technical expediency may they usefully be asked to forego initiative in matters of finance. Furthermore, at least in the case of Congress, the Senate cannot stop the wheels of government by refusing to pass an appropriation bill. If none is passed, the provisions of the previous bill prevail until superseded.

In one particular the case is otherwise with Congress. As a result of the great compromise of 1787, the States stand on a parity in the Senate, each with the same power as that of any other, large and small alike. When some issue concerning the methods of raising money or involving large expenditure leads the smaller States to act unitedly, they can of course exert far more influence in the Senate than in the House, where membership is in proportion to population. When agrarian interests conflict with those of industry and commerce, when it is a matter of factory against farm, or city against country, the advantage of originating money bills, slight though it now be, may help to even up the balance. Save in exceptional instances, however, the tangible result has shown itself only in the shape of lengthy debates in the two branches as to their respective rights.

#### DEFINITION DISPUTES

The controversy has been mainly over definition — the cause of so many of the disputes of mankind. What is a money bill? What is a revenue bill? Do either or both cover both the raising and spending of money? If they cover the levying of taxes, do

they cover the lessening or removal of taxes? Do they include everything relating to finance, or only taxes and appropriations?

Here again origins must be examined for the sake of understanding, and inasmuch as the framers of our Constitutions used much phraseology brought or borrowed from the mother country, with the meanings customary there, we must first turn to Parliament for light. To that body the questions involved were of little or no consequence before the seventeenth century, because of the simple nature of the transactions prior to that time. When the King wanted money, of course he had to tell the purpose for which he wanted it, at first to help along the bargain, later to make the representatives of his people generous, but although the purpose for which the grant was made, was often mentioned in the record or bill, it was not so mentioned as a condition or stipulation.

When government began to emerge from the absolutism into which it had fallen under the Tudors, more systematic handling of fiscal affairs showed itself to be advisable. One result was that when the House of Commons, sitting as the newly devised Committee of the Whole, dealt with money matters, about 1620 it came to be known as the Committee on Supply. Not until a score of years later was the raising of money set off by itself as a function of the House sitting as Committee on Ways and Means.

With the Stuarts had come palpable reason for seeing that the monarch spent the money as the Commons intended. So we find an act of 1624 granting an aid to James for the war expected with Spain, directing that the sums levied should be paid into the hands of eight citizens of London named as treasurers, and expended only upon the warrant of at least five of ten other persons named as the King's council for the war.

The tyrannies of the first Charles and the extravagance of the second developed the tendency to put clauses of appropriation in supply bills. When in 1665 the Commons put into the supply bill for the war with Holland a proviso that all moneys raised by virtue of the act should be solely applicable to the service of the war, and issued out of the Exchequer only upon warrant or order mentioning that they were payable for such service, Clarendon furiously opposed on the ground that this was derogatory to the honor of the Crown, but Charles himself approved, in the belief that the banks would the more readily lend the

money. This made it easier to establish the principle, and although the servile House of Commons that met when James II mounted the throne, took credit to itself with the King for not specifically appropriating the supplies granted, from the time of William of Orange specific appropriation has been the invariable usage. Perhaps more than any other thing this marks the transfer of power from the Crown to the people. It is one of the landmarks of the spread of popular liberties.

The new idea brought with it the question of whether a bill entailing the expenditure of money was a money bill, and as such must originate in the House of Commons. When in 1661 the Lords sent down a bill for paving the streets of Westminster, the Commons laid it aside because "it went to lay a charge upon the people," and they brought in another. Thirty years later the Commons had occasion to resolve that "the disposition, as well as the granting of money by act of Parliament hath ever been in the House of Commons," which the Lords stoutly denied, and the bill was lost by disagreement between the two Houses. In the course of the next hundred years, although the Lords never admitted the contention of the Commons, it became fairly well settled that in England an appropriation bill is a money bill, with the exclusive right in the Commons to originate. However, up to recent days the Lords were permitted to originate bills where charges on the people were but incidental, and no instances have come to my notice of carrying the doctrine in England to the absurd degree of quibbling now and then found in American lawmaking bodies.

Time was when the jealousies of the lower branch in these matters were just as important in securing the liberties of the people in the American colonies as they had been in the mother country, and disputes that at first glance seem to have been petty, were of far-reaching influence. Thus in Massachusetts the right of the people to tell how their money shall be spent grew out of a series of squabbles between General Courts and Governors. Hutchinson tells us (II, 266) that though the right of the Representatives to originate money bills was undisputed, "they went further and intrenched upon the charter rights of the Council and allowed no payment to be made for services until they had judged whether they were performed and had passed a special order for such payment." They even voted that there should be paid out of the Treasury to the Speaker of the

House three hundred pounds sterling "to be applied *as they should direct*." After about three weeks of altercation, it was agreed that one hundred pounds should be so allowed, and that two hundred pounds be paid to such agent as should be chosen by the whole Court. The House gained the point at issue, and continued to designate the objects for which moneys were raised, thus leaving nothing to the discretion of the Governor and Council, until 1729, when Governor Shute vetoed an appropriation bill for this reason. The dispute that followed was settled unfavorably for the House. In 1732, however, the Representatives succeeded in passing a bill in a fashion not materially differing from the old method. In 1733 they successfully claimed a right to audit the public accounts. In later years grants for the defense of the Province were so made that the Governor and Council were restrained from drawing money from the treasury "for any other purpose." Governor Pownall submitted to this invasion only under protest, though his predecessor had allowed it without complaint. In 1762 the House remonstrated against the method in which the executive power had been exercised in this particular, stating that it was "annihilating one branch of the Legislature" <sup>1</sup>

Even after the disappearance of the royal Governors, hated and feared, the jealousies of the lower branch survived. In the year after the adoption of the new Constitution the finicky Massachusetts House objected because the Senate had chosen a committee to inquire whether all the town returns of valuations were correct. This was averred to be a subject relating to money, on which the House alone could take the initiative. The problem was sent to the Justices of the Supreme Courts for their opinions. Very sensibly and quite solemnly the honorable Justices pointed out (126 Mass. 547) that the settlement of a valuation is not an act of legislation, and that where it originated made no difference.

The conclusion was reasonable, but one sentence by which Chief Justice Cushing reached it, was unfortunate. Said he: "I suppose a money bill to be a bill imposing a direct tax on the people." Could he have considered the matter longer, he might not have been so positive. His apologetic reference to "the short space allowed" suggests hasty thinking and raises a doubt strengthened by what his associate, Justice Sullivan, said. "In a

<sup>1</sup> F. L. Riley, *Colonial Origins of New England Senates*, 15 note



question so complicated and of such magnitude, I could have wished that a longer space than two days had been allowed me." Nevertheless, Cushing's supposition settled the matter for Massachusetts. Accurate judicial definition, however, was not reached until 1878, when the Justices of the Supreme Court, in a lengthy and learned opinion, with exhaustive historical treatment of the subject (126 Mass 557), gave it as their belief that the exclusive privilege of the House of Representatives is limited to bills that transfer money or other property from the people to the State, and does not include bills that appropriate money from the treasury to particular uses of the government or bestow it upon individuals or corporations.

Elsewhere the early Constitutions were not wholly without attempt to anticipate differences over definition. Maryland, giving to the House of Delegates the power to originate all money bills, tried to tell what should be deemed such, declaring, "that no bill, imposing duties or customs for the mere regulation of commerce, or inflicting fines for the reformation of morals, or to enforce the execution of the laws, by which an incidental revenue may arise, shall be accounted a money bill, but every bill, assessing, levying, or applying taxes or supplies, for the support of the government, or the current expenses of the State, or appropriating money in the treasury, shall be deemed a money bill." This was the only one of the original States that referred to appropriating money. New Hampshire had spoken of "raising, levying and collecting money." South Carolina, Virginia, New Jersey, Delaware, and Massachusetts used the term "money bills." South Carolina in 1790 changed to "bills for raising a revenue," Delaware likewise in 1792, and New Jersey in 1844. New Hampshire, however, in 1784 copying much from the Massachusetts Constitution, took over the vague term "money bills." It disappeared in Virginia in 1830, with the dropping of the clause forbidding the Senate to amend money bills, and in Maryland in 1851, when each branch received the power to originate any bill. Only Massachusetts and New Hampshire still cling to the uncertain phrase.

Delaware further lessened doubt by saying in 1792 that "no bill, from the operation of which, when passed into a law, revenue may incidentally arise, shall be accounted a bill for raising revenue." Nebraska in giving each House the power to originate bills, excepts bills appropriating money, which are to originate

only in the lower branch. Georgia sets an example of clarity by saying that "all bills for raising or appropriating money shall originate in the House of Representatives," and Louisiana declares likewise

The influence of the Massachusetts interpretation of 1781 had not become appreciable half a dozen years later when the Federal Constitution was in the making. The Pinckney draft, on which the discussion was largely based, read in this particular: "All money bills of every kind shall originate in the House of Delegates." When the committee reported the momentous compromise, Madison gives it as reading, on this point, "all bills for raising or appropriating money", Yates makes it, "for raising or apportioning money." The paragraph ended, ". . . no money shall be drawn from the public treasury but in pursuance of appropriations to be originated in the first branch." Three times "raising or appropriating money" appears in the records of the next few weeks, then came a motion by Randolph, August 13, "Bills for raising money for the purpose of revenue, or for appropriating the same", and two days later one by Strong, ". . . except bills for raising money or for the purposes of revenue, or for appropriating the same." In the end the Committee of Eleven that was working out the situation made the phraseology, "All bills for raising revenue", these were the words reported by the Committee on Revision of Style, and so they stand to-day.

Such record of the proceedings as we have, does not show that there was any intent to change the scope of the provision by excluding appropriation and thus confining it to income. No comment was made, no protest entered. On the other hand it is clear that at least some of the delegates believed they had provided for "money bills" in the broadest sense. Madison used that phrase in the Virginia Convention for ratification, Wilson in that of Pennsylvania. Parsons, using it in Massachusetts, coupled "supplies" and "salaries," as if they were interdependent. Iredell, using it in North Carolina, said "The authority of money will do everything. A government cannot be supported without money. Our representatives may at any time compel the Senate to agree to a reasonable measure, by withholding supplies till the measure is consented to." He took credit to his State for helping to secure this power for the lower branch.

In the first Congress to meet after the Constitution had been

adopted, the first measure to be taken up was the revenue bill. In the course of the long debate, here again "money bills" were the words of the phrase repeatedly used. While the bill for establishing the Treasury Department was under consideration, that phrase and "bills for raising revenue" were used with little discrimination. At the same time came the first of a long series of attempts to carry the principle to an extreme. Mr Page objected to making it the duty of the Secretary to "digest and report plans for the improvement and management of the revenue, and the support of the public credit" Long debate followed, various members supporting Page by reason of their fear that even the preparation of plans might be an invasion of the prerogative of the House Such jealousy of a privilege may at least attest contemporary appraisal of its value

A decade or so later came another episode where the doctrine was carried to the point of quibble Toward the close of the session in 1800 a committee recommended that the Secretary of the Treasury should lay before Congress at the beginning of every session a report on finance with plans for the support of credit. Gallatin and Nicholas, unrelenting foes of the administration and on the alert to make trouble, opposed the bill on the ground that it was a money bill and had originated in the Senate Griswold and Harper at once took the valid ground that an informatory report could not be brought under the prohibitions in the matter of a money bill, and the measure passed by 43 to 39 An ironical Fate brought it about that the very first report made under this law was made by Albert Gallatin himself in the following year. It was sent in to the Senate, which was an interesting change of attitude, whether really significant or not as a change. Washington had in essence copied the practice of colonial Governors by beginning his first annual address with the salutation: "Fellow-Citizens of the Senate and House of Representatives" Coming to a passage relating to finance, he introduced it with — "Gentlemen of the House of Representatives", and on its conclusion changed again, this time to — "Gentlemen of the Senate and House of Representatives." This form he followed in each of his other annual addresses, and Adams did the same thing, but Jefferson abandoned the discrimination Seeking as we are to find out what the authors of the Constitution meant by their words, this sidelight on the control of the purse is not to be ignored.

For the same reason a practice of Parliament, presumably known to our fathers, should be taken into account. There a money bill, unlike all other bills, when it has passed the Commons and the Lords, is returned to the Commons. The Clerk of that body, on the day for signifying the King's assent, carries the bill over to the House of Lords, where at the bar he delivers it to the Speaker, who in turn hands it over to the official charged with signifying the royal assent, the Clerk of Parliaments.

With us the lower branch has not clothed its privilege with ceremony thus regularly repeated, but it has not failed to assert its rights whenever serious occasion has arisen. Prior to our own time the most noteworthy instance has been that connected with Henry Clay's tariff bill in 1833. Two years before, a proposal by Benton for the abolition of the duty on alum had been defeated in the Senate on account of constitutional objection. Nevertheless Clay introduced his bill in the Senate, where it was at once met by objection from Senator Forsyth on the ground that as it contained a section proposing an increase of duties on certain woollens, it was in conflict with the constitutional provision. Clay insisted it was not a bill to raise the duties, but to reduce them, "and therefore did not come within the reach of an equitable objection." After much hesitation the Senate allowed the bill to be introduced, but in the debate that followed many Senators expressed in the most positive manner the opinion that the Senate had no right to originate such a bill. Daniel Webster said the attempt to evade the question by contending that the bill was intended for protection and not for revenue, afforded no relief, for it was protection by means of revenue. It was not the less a money bill from its object being protection. After 1842 the bill would raise a revenue, or revenue would not be raised by existing laws.

The debate showed Clay that he could not risk a decisive vote with the constitutional difficulty threatening, and so he avoided it by a shrewd move. His friends in the lower branch having been quietly warned of what was coming, a motion to strike out the body of a pending measure and insert Clay's bill caught its enemies off their guard and prevailed while members were putting on their overcoats to go to their dinners. So the compromise reached the Senate in the shape of a House bill, and with the constitutional objection thus removed, was accepted.

Eleven years later Senator Evans reported a resolution that the bill to revise the compromise tariff should be postponed as it could not originate in the Senate, and the resolution after long debate was passed. In the course of the Civil War a Senate bill providing for a five per cent income tax was strenuously opposed by Thaddeus Stevens, with the result that the Senate receded from its position. In 1871 the Senate passed a bill abolishing the income tax, which the House immediately returned, raising the constitutional objection. A conference committee could not agree. The report of the House members closed with a resolution "that the House maintains that it is its sole and exclusive privilege to originate all bills directly affecting the revenue, whether such bills be for the imposition, reduction, or repeal of taxes," etc. The exhaustive speech on the subject that James A. Garfield obtained leave to print (March 3, 1871), discussed it admirably.

Notice that the House report confined itself to bills "directly affecting the revenue." Thereby it avoided an issue often raised, and that has reached the courts at least ten or a dozen times. They have been at odds in the matter. Some have excluded incidental revenue, some have extended the constitutional provision to cover all revenue. The latest holding is that of Judge Hough in the United States District Court in connection with the Cotton Futures Act of August 18, 1914, known as the Lever Bill. The case was that of *Hubbard v. Lowe*, 226 Fed. Rep. 135 (1915). The Judge was little disturbed by the precedents against incidental results, saying: "It has sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate was not a bill for raising revenue." He relied upon the doctrine of *McCray v. United States*, 195 U. S. 27, 59, that the motive or purpose of Congress in adopting a statute cannot be inquired into. "It is immaterial what was the intent behind the statute, it is enough that the tax was laid, and the probability or desirability of collecting any taxes is beside the issue." He said all the counsel in the case had agreed that this was a revenue bill within the constitutional meaning, though every one who had studied the investigations, reports, and discussions preceding and producing the passage of the act knew that nothing was further from the intent or desire of the lawmakers than the production of revenue. The Government appealed the case, but the Solicitor-General, John W. Davis,

must have concluded he had no chance in the Supreme Court, for on his motion the appeal was dismissed

Nevertheless the Senate, convinced against its will and of the same opinion still, thrashed over the old straw through most of two days, January 22 and 23, 1925, proving to its own satisfaction that a bill increasing postal rates was not a revenue bill, whereupon the House Committee on Ways and Means reported to the contrary and the House returned the Bill to the Senate

There is further the question of whether borrowings are "revenue" within the purview of the constitutional provision. The issue rose under striking circumstances when Congress had been called together in special session by reason of the financial crisis of 1837. Chairman Cambreling of the Committee on Ways and Means told the House the Treasury was in such condition that the specie could not be obtained for a little draft of \$811. The Senate got the start of the House in passing a bill for the issue of Treasury notes. When it reached the House, John Bell, afterward to be nominated for President, instigated John Quincy Adams, who had been President, to question the right of the Senate to send over such a bill. Although the exigency was great, the need for haste imperative, Adams felt it was of still greater importance to maintain the constitutional prerogative of the House. In his opinion the matter admitted of no question at all. "If ever there was a money bill, this was one." Robertson declared it was the greatest breach of the privileges of the House that had ever been perpetrated. Cambreling, on the other hand, held the bill did not propose the levying of a tax, and declared it a mere anticipation of revenue, but to avoid difficulty he moved to lay the Senate bill aside and instead to take up one of the House bills to the same end.

Not always has the issue been raised. It was escaped, for instance, by the act of March 3, 1815, repealing several acts imposing duties on tonnage, and regulating the relative duties charged on goods imported in foreign vessels and vessels of the United States. In spite of the fact that this was a regulation of commerce rather than revenue, it probably received the assent of the House because the point was not made, the bill passing on the last day of the session, without debate, and consisting of but a single brief section. Nowadays such a bill would be likely to arouse protest.

Our troubles over definition would be escaped if we had been fortunate enough to anticipate the remedy happily provided in the Constitution of the Irish Free State. There if dispute arises as to what is or is not a money bill, on the request of two fifths of the members of either House, a committee of six members, three elected by each House, and a senior judge of the Supreme Court, "able and willing to act," will decide.

#### PRECEDENCE AND PROCEDURE

The persistency and power of the belief that the lower branch should have the whiphand in all matters of finance gets remarkable illustration from the Congressional practice in the matter of the big appropriation bills. On its face the Constitution seems to leave no shadow of chance for doubt. As to beginning it does not go beyond saying: "All bills for raising revenue shall originate in the House of Representatives." In the common usage of to-day, "revenue" carries the idea of income, and not that of outgo. Yet from the start and with assent continuous, though not without occasional protest, the lower branch has had a monopoly of originating the big appropriation bills. This is defensible only on one or both of two grounds. That when the Constitution was written, "revenue" was equivalent to "money", that continuous practice has established an interpretation of the Constitution so firmly that it is now beyond question.

Turning first to the dictionaries, we find that those of the 18th century do not go into detail enough to be of service. When in the next century those printed in England began to be copious, they gave two elements to the definition of public "revenue," one the income element, the other the outgo element. Such in the main continues to be the English construction. It was copied in the earlier American dictionaries of size, and has not yet been rejected by all the American lexicographers. Regardless, however, of what a modern definer might say were the full bearing of his decision brought home to him, there can be no doubt, as we have seen, that the leading men of the Federal Convention drew no distinction between "money" and "revenue." The weight of the evidence is that they thought they were giving to the lower branch the control in all matters of finance, whether income or outgo.

In this they were justified, and the English lexicographers were

justified, by what had become the procedure of Parliament, which is to-day much what it was in 1787. There the getting and the granting of money are inseparably combined. Note the course of affairs. The House of Commons, sitting as that Committee of the Whole which is known as the Committee of Supply, decides how much the Government may expend, sitting as the Committee of Ways and Means, it passes the tax bills for getting the money, finally, sitting again, and to the American mind not quite logically, as the Committee of Ways and Means, it passes the formal authorization for the money to be drawn out of the Treasury. In England the getting and the granting are two fractions of a unit, are complementary, are reciprocals.

The theory of this was familiar to American statesmen of the period when the Constitution was written, and they supposed it had been embodied in that document. For instance, note the words of James Monroe in the lengthy discussion of our constitutional structure with which he accompanied his veto of the Cumberland Road bill, May 4, 1822. Monroe was not a delegate to the Convention of 1787, but he had shared in the debates produced and had entered the Senate in 1790. It was as President that he said "The right of appropriation is therefore secondary and incidental to the right of raising money." To be sure, he was addressing himself to another clause of the Constitution, but that did not affect the principle of his declaration.

Such was the belief of the times. Therefore it was wholly natural that at the very outset the lower House should construe "revenue" as money in the public treasury made available for the uses of the government; that it should apply "raising" to the whole process, from the levy to the expenditure, that it should grasp the granting as well as the getting of money, appropriation as well as taxation.

Four weeks after a quorum of the 1st Congress appeared, a committee of three was named "to prepare and report an estimate of the supplies requisite for the present year." Ten days later this committee received authority to collect information as to imports and exports, which indicates that income was within its jurisdiction. Its report of July 9 was tabled, and on the 24th a resolution passed providing for a Committee on Ways and Means, one member from each State, to investigate the question of supplies. Evidently it was to view the finances



of the new nation in their broader aspects, for when presently it was discharged, the subject was turned over to the Secretary of the Treasury, Alexander Hamilton, who thereupon wrote his famous report upon the public credit. On the same day the Committee was discharged, the newly appointed Secretary was ordered to report fresh estimates, but no action by the House resulted until the next session, when a committee of three was named to bring in a bill.

For a time the use of similar select committees was the rule. In December, 1796, the membership was enlarged to sixteen, and it was appointed as a Committee of Ways and Means. Mr. Gallatin, making the motion, called it a standing committee, but not till six years later did it become such, as we now understand the term. The committee of 1796 was, if I observe correctly, the first bearing the name to report an appropriation bill, the purpose being to defray the expenses of the civil list. Thereafter until 1865 the Committee of Ways and Means reported all the general appropriation bills, as well as those relating to taxes, and also had general oversight of the debt.

It was, in fact, the Committee on Finance, and such is the name still given to the corresponding committee of the Senate, which handles both taxation and appropriation matters — a unity of jurisdiction that might deter Senators from arguing that the functions are independent enough to warrant diverse application of constitutional phraseology. In the House it was the growth of work that compelled the dividing begun in 1865. Reluctance to separate taxation and appropriation restricted the first step to turning over banking and currency matters to a committee created for their handling. Since then all appropriation has by stages been taken away from the Committee on Ways and Means, but it has been because of the necessities of the case rather than as in any sense a disavowal of the original principle.

With the spread of the budget system came revival of the theory that revenue and appropriation ought to be combined. It was not applied to Congress, but appeared, for example, in Massachusetts, where it was stipulated that special appropriation bills passed by the Legislature must provide the additional revenue necessary to finance the new proposals. As Benjamin Loring Young, Speaker of the House, said, "The Legislature must not appropriate against a deficit. The general fund of the

State treasury must no longer be regarded as an inexhaustible source of wealth. No money — no appropriation ”<sup>1</sup>

In Congress the first appropriation bill concerned itself with both getting and granting, it began by telling the sources from which the money should be drawn, and afterward directed to what purposes it should be applied. On the other hand one of the early bills for the imposition of duties directed that \$600,000 should be set aside for the public expenditures. In a few instances in the course of the next three-score years the Senate was allowed to originate specific appropriations of no great consequence, but it made no attempt to originate a general appropriation bill until the winter of 1855-56, when the House took two months to elect a Speaker. This so much delayed business that in the Senate it was proposed to go ahead with the appropriation bills. Seward, contesting the right of the Senate to do this, argued that as the custom of having the House originate could not have been accidental, it must have been intentional, and that the contemporaries of the Constitution itself must have meant and understood that bills of a general nature for appropriating the public money belonged to the province of the House of Representatives. His argument did not convince, for an appropriation bill was reported in the Senate, passed, and sent to the House. The lower branch, however, stood by its prerogative and ignored the bill. Fifteen years later the issue was raised again, committee reports in the Senate in 1871 and 1872 upholding the Senate side of the question.

The disability on the part of the Senate has not been held to extend to other than the general appropriation bills, and the Senate is continually originating bills for pensions, claims, public buildings, and other minor matters. Its right to do this was considered by the House Committee on Judiciary in 1881, with a report sustaining the Senate, the specific question being the right of the Senate to originate a bill for buying land adjoining a new public building. The report was recommended, indicating the House was not willing to put itself definitely on record as approving a course that is in fact customary. The situation strikingly illustrates how custom gets the force of law.

It is fortunate that the Senate makes no attempt to interfere

<sup>1</sup> *The Budget System as a Preventive Measure against Public Extravagance*, at the National Tax Conference, St. Louis, Sept. 15-19, 1924.

with the practice whereunder the House originates the general appropriation bills. If for no other reason than that of securing orderly procedure, it should always be maintained. It fits in best with the budget system. It gives the preliminary treatment to sub-committees of a much larger committee than the Senate could well organize, thus sub-dividing the huge task so that each class of expenditure can get minute scrutiny and thorough study. On the other hand it is not amiss that there should be revision in a second branch, even if at times questionable increases result. The gain more than offsets the loss.

There is another reason why it is well that the scope of the constitutional provision should not be confined to bills imposing taxes and regulating excises. Changes in the laws relating to income are made only at intervals of several years. Rarely is there imperative need for quick action in regard to them. Serious attempt to use them for coercive purposes would result only in delay that would work no important harm. Whatever value there may be in the right to originate would, therefore, be of much less consequence if it could be exercised only when income is in question.

On the whole the practical result of the constitutional provision is praiseworthy, even if the expectations of its authors have not been fulfilled. Judging by the eulogistic words of Hamilton or Madison in No. 58 of "The Federalist," they thought they had secured to the lower branch the power of the purse, they thought they had secured to the larger States "a constitutional and infallible resource" in the way of protection against the smaller States; they thought that by use of this resource the larger States would be "able at all times to accomplish their just purposes."

It would be hard to show that the power has ever been importantly used to such ends. Only one instance of even the threat to use it has come to my notice. In 1878 the Democrats controlled the House, the Republicans the Senate. The Democrats resented bitterly the election laws that the Republicans had passed, primarily, it was well understood, that the votes of colored men might be safely cast and rightly counted in the Southern States. It was given out that unless the States should be allowed to conduct their own elections in their own way, free from all Federal interference, the Democrats of the House would, under their constitutional right, free from all Federal inter-

ference, refuse to make appropriations to carry on the government.<sup>1</sup> However, nothing came of the threat

In England any doubt of the virtually complete power of the Commons over the purse was removed by the Parliament bill of 1911, which provided that a money bill must be passed by the Lords within a month, and without amendment, to escape being presented directly to His Majesty and becoming law upon his assent, now never refused. Canada established the principle long ago. In the Parliament of 1841, when the Legislative Council undertook to amend a money bill and it was sent back to the Assembly, an outraged member of that body took the amended document and kicked it out of the chamber. Since 1870 the Senate has not tried even to reject a money bill, and all concede that it has no right to make so much as a material amendment, though it may correct details of language. When Australia came to profit by the experience of other lands and draw an up-to-date Constitution, she forbade the Senate to amend money bills. In the Irish Free State money bills are to be sent to the Senate for recommendations only, and are to be deemed as passed if not returned within twenty-one days. In Holland the upper branch must approve or reject in full.

#### AMENDMENT BY THE UPPER BRANCH

When the colonizing of America began, it was well established in England that all grants in Parliament of subsidies to the King must begin in the House of Commons. The right of the Lords to reject was admitted, and their right to amend does not appear to have been denied in the Commons before 1671. Then and in 1678 controversy between the two Houses on this point was ended by prorogation, but the resolution of the Commons claiming exclusive right has often been reaffirmed, and the Lords, though never expressly disclaiming the right to amend bills of supply, have never since asserted it importantly. If in trifling matters they have now and then stepped over the line, perhaps unintentionally, the Commons have usually set aside the offending measure and substituted one containing no shadow of concession. They even hold that the Lords have no right to insert in a bill pecuniary forfeitures or penalties.

The discussions of the subject by the Parliaments of Charles II were fresh in mind when the charter of William and Mary

<sup>1</sup> George F. Hoar, *Autobiography of Seventy Years*, II, 102-05

came to Massachusetts, and very naturally inspired the belief that the Council of the Province was to give no more than a bare assent or dissent to the financial measures sent up by the House. To be sure, it was not the notion of the home authorities that the force of the precedents of Parliament extended to the provincial Assemblies. Lord Camden when Attorney General gave an opinion in which he said "Our House of Commons stands upon its own laws, the *lex parlamentaria*, whereas assemblies in the Colonies are regulated by their respective charters, usages, and the common law of England, and will never be allowed to assume those privileges which the House of Commons are entitled to justly here, upon principles that neither can nor must be applied to the assemblies of the Colonies"<sup>1</sup>

Nevertheless the Assemblies took the privileges, whether they had a right to them or not. Thus when, in 1705, the New York Council sought to amend a money bill that had been passed by the Assembly, its right to do this was denied by the Assembly, which claimed exclusive jurisdiction, by reason of the ancient privileges of the House of Commons. The question was submitted to the Lords of Trade, who, in 1706, informed the Governor that, in their opinion, the Council had as much right as the Assembly to originate money bills, or to amend such bills passed by the Assembly. The controversy was renewed on the same grounds in 1710, with the same result, but the opinions expressed by the Lords of Trade did not affect the judgment of the Assembly, nor its claim that it had exclusive power to originate and control money bills. The colonial records show that even as late as 1751 a money bill which was originated and passed by the Council was rejected by the Assembly because that body had the exclusive right "to begin all bills for raising and disposing of money"<sup>2</sup>. When the matter came up in New Jersey, in 1740, the Board of Trade said the Council might amend, but the lower branch stood by its rights and continued to deny the Council any part in appropriations.

A most trivial episode brought out in 1739 a declaration by the South Carolina lower House of its rights in this matter. The Commons omitted prefixing "Honorable" to the name of the Secretary of the Province in the estimates to the tax bills. A jocular objection by the Council was taken seriously and

<sup>1</sup> Chalmers Opinions, 263

<sup>2</sup> C. Z. Lincoln, *Constitutional History of New York*, I, 447

renewed the discussion of the right of the Council to amend. War with Spain was imminent and the safety of the province would not permit a controversy, so agreement was reached that when the Council desired an amendment they would present it on a separate schedule which they would send to the Commons with the money bill, and then the amendment would be proposed from the floor of the House and considered. The House, however, inscribed in its Journal in large and bold characters a declaration that the upper House in undertaking to make changes had violated the privileges of the lower House, "it being the undoubted right and privilege of the Commons' House of Assembly to have the first commencement and sole modelling of all laws for imposing taxes and levying and raising aids of money" <sup>1</sup>

In view of this it is not surprising that when the sages of South Carolina drew her first Constitution, in 1776, they declared that money bills "shall not be altered or amended by the legislative council [the upper branch], but may be rejected by them." According to General Pinckney, speaking in the Federal Convention of 1787, this was evaded by informal schedules of amendments handed from the Senate to the other House, according to James Madison, speaking of South Carolina in the Virginia Convention of 1788, it was a continual source of disputes. On the other hand in Virginia, which at the start required all laws to originate in the House of Delegates, with power in the Senate to amend any "except money-bills," Madison said no inconvenience had resulted. Probably this difference in effects was the reason why, although South Carolina abandoned the restriction on the upper branch in 1790, Virginia did not take the trouble to do away with it until the revision of 1830. Until 1844 New Jersey did not allow the upper branch to amend money bills, but Delaware permitted it from the start. From a provision aimed at riders it may be inferred that the Maryland Senate could not originally amend a money bill, in 1851 the power of either branch to amend any measure was definitely specified.

Massachusetts said the Senate "may propose or concur with amendments, as on other bills." Yet a Massachusetts man, Elbridge Gerry, tried to persuade the Federal Convention not to let the Senate amend, and he helped get the Convention to

<sup>1</sup> Edward McCrady, *History of South Carolina*, II, 181

adopt resolutions in which this prohibition was a feature. It was with a margin of but one State that these were carried, his own delegation dividing equally, and although the provision stood for some time as the sense of the Convention, in the end it went by the board in the general compromise, the phrascology of the Massachusetts Constitution being adopted. Madison viewed the matter with his usual clarity. He told the Virginia Convention it had always appeared to him a matter of no great consequence whether or not the Senate had the right of originating or of amending. The right "would add the intelligence of one House to that of the other." He foresaw the inconveniences that would follow its refusal.

Even though the Constitution clearly gave the national Senate the right to amend, inconveniences have not been escaped, and there are those who would use a harsher word to describe what they think the damage. Minor amendments might do no great harm, but when it came to substituting in the Senate a complete revision of the tariff for a two-line bill repealing tea and coffee duties, as was undertaken in 1872, the House rose in revolt. After debate at length, it resolved that the course of the Senate was "in conflict with the true intent and purpose" of the Constitution, and it laid the bill on the table. This contumelious treatment led the Senate to indignant and learned retort, with no action save to transmit to the House the elaborate report of the Committee on Privileges and Elections.

After that the strengthening of the prerogatives of the Senate seems to have brought it speedy vindication. In 1879 we find George F. Hoar, who had served in the House and had now become a Senator, describing the conference committee process in terms indicating that the Senate had won the mastery. That is the process under which the Senate amends as it sees fit, and the two drafts then go to a special committee of the two branches, to which the rules give almost controlling power if the committee can agree. "Degrading as this system is to the House as a body," wrote Mr. Hoar, "its effect on the individual member is still more remarkable. The whole power of legislation over that vast field which is covered by the Senate's amendments to the great appropriation bills is in practice delegated to two of the three members who are appointed on the conference committee. No other members get a chance to discuss them, to vote separately on any one of them, to make any

motion in relation to them, or even to see in print what the committee recommend in regard to them 'Gape, sinner, and swallow.'"<sup>1</sup>

The prestige of the Senate was heightened by Speaker Reed's rules meant to expedite business in the House. They had a secondary effect not contemplated. Representatives who could not get a chance to push in their own body their pet schemes for spending money, went over to the Senate and persuaded Senators to tack the projects to appropriation bills by way of amendment. Little by little the Senate accustomed itself to almost ignoring what the House sent over in the way of a money measure, and the country came to expect that the Senate will do no more than take a House bill for the foundation of its own structure. Occasionally the House tries to retrieve its fortunes and assert its dignity. Thus in 1905 by a vote of 263 to 5 it returned to the Senate a bill the upper branch had amended in the matter of a drawback of the duty on wheat, but such attempts to re-establish its view of the Constitution have so far been of little avail. With our entry into the Great War the dominating influence of the Senate reached the zenith. It has been averred that during the course of the war there was not a single piece of financial legislation that did not in great part originate in the upper branch.

The political philosopher may find ground for morahzing in this complete reversal of the intentions and expectations of the men who wrote and the men who advocated the Constitution. Theophilus Parsons in the Massachusetts Convention of 1788 defended the new instrument in this particular by saying that if the Senate had not the power to amend, "the Representatives might tack any foreign matter to a money-bill, and compel the Senate to concur or lose the supplies." The opportunity they meant to take away from the House, they gave in practical effect and actual result to the Senate. Parsons believed that if the House had the control, the balance between the two branches would be endangered, if not destroyed, and the Constitution materially injured.<sup>2</sup> Some have thought the injury accomplished, though by the means intended to prevent it. One sagacious critic, William H. Moody, before he left the House for

<sup>1</sup> "The Conduct of Business in Congress," *North American Review*, February, 1879

<sup>2</sup> *Debates in the Massachusetts Convention of 1788*, p. 192.



the Cabinet, from which he was to go to the Supreme Bench, concluded it was unfortunate indeed that the plan originally determined upon in the Federal Convention, by which full control of all bills raising and expending money was vested in the House, with a simple negative in the Senate, did not prevail.<sup>1</sup>

Whether or not the Constitution has suffered, there can be little question that the Treasury has suffered. Millions have been added to House bills by the Senate. On the other hand Senator Smoot was able to declare in debate that in the course of his eighteen years of service the Senate once and only once had reduced an appropriation as passed by the House. The lower branch was made in large part helpless to prevent Senatorial liberality, by the rule compelling acceptance or rejection of conference reports *in toto*, without opportunity for amendment. So in the matter of changes in the big appropriation bills there was no practicable way of getting at obnoxious items without killing the whole bill. House conferees could hardly be blamed for accepting some of the demands made by those of the upper branch. A conference is necessarily to some extent a matter of bargain, of give and take. Perhaps in the compromises the House conferees got all that could be expected, but the House itself was virtually precluded from insistence upon its own point of view in any particular matter. Revolt against this handicap took shape in one of the changes in the House rules when in 1920 the budget program was temporarily checked by the President's veto. The new rules survived and one of them was to the effect that when a Senate amendment to a general appropriation bill would if offered in the House be in violation of the rule against expenditure not authorized by law, it shall not be agreed to by the House conferees unless they are so directed by a separate vote of the House.

Money amendments by the Senate to House bills other than those of general appropriation have had and still have a parliamentary status that is uncertain and unsatisfactory. In 1864 when the House questioned the right of the Senate to provide a tax on incomes by an amendment to a non-revenue bill, the Senate withdrew the amendment. In 1878 the House returned to the Senate a House bill about postroads to which the Senate had added revenue amendments, the House vote being 169 to 68. Speaking more emphatically with a unanimous vote, the House

<sup>1</sup> "Constitutional Powers in the Senate," *North American Review*, March, 1902.

in 1905 sent back a bill relating to the taxation of bonds issued to aid isthmian canal construction. The Senate had stricken out all of the House bill after the enacting clause, and inserted somewhat similar provisions. A conference committee had restored the substance of the original House bill, but used the Senate language. Nevertheless the House insisted strictly on its prerogative.

The issue was brought up almost dramatically by the Farm Relief bill of 1929. As this measure left the House it was a money bill in that it authorized the appropriation of \$500,000,000 for a revolving fund, to be lent, and appropriations for other expenditures. Attempt had been made to amend it by inserting the so-called "debenture plan," whereby the Board to be created would be empowered to issue to exporters of agricultural products debentures (certificates of indebtedness payable by the Treasury), at a rate one half that of the import tariff on the product in question. Applied to the seven commodities most likely to enjoy the privilege, and estimating on the basis of the exports of the preceding three years, this would mean additional taxation to the extent of about \$150,000,000 a year. In the House Committee of the Whole an amendment inserting this project was ruled out of order as not germane. The Senate, still working under Jefferson's Manual, is not hampered like the House by rules of germaneness, it put the debenture plan in the House bill, and the issue was joined.

There could be no question that the Senate might amend the money provisions in the House bill. Could it add authority to increase the public debt, to the amount of certificates of indebtedness issued for carrying out a project not contained in the House bill? Could it thus compel ultimately appropriations of, say, \$150,000,000 a year? The House thought not, and at first was inclined to refuse a conference while the obnoxious provision remained in the bill, but time pressed, the wish for results was general, and so the bill was sent to conference, but the House saved its rights by recording formally its doubt of the constitutionality of the Senate's action.

The House conferees were unanimous in the belief that this particular matter ought to be settled first. So they refused to consider at all the other matters in issue until the Senators should yield on the constitutional point. The Senators declared they would not yield until the House had been given a chance

to vote on the debenture plan on its merits. For tactical reasons such a vote was to be avoided in the House if possible. Deadlock of days followed. At last the House yielded, rather than take the responsibility for the failure to enact the legislation for which chiefly the special session had been called. A conference report of inability to agree was permitted, the House sent the bill back to conference with instructions not to accept the debenture amendment, the vote on these instructions gave the Senate the House roll call that for political reasons the Senate wanted, this showed that the House was more than two to one against the debenture plan, and then the Senate abandoned it, though with the threat that it would be tacked to the tariff bill pending.

The plan contemplated that the debentures should be used by importers in the payment of tariff duties. At first blush it was thought that this was what infringed the mandate of the Constitution, and such may still be the general impression, but it is doubtful if that view is correct. Such use would not lessen the revenue from the tariff by a dollar. The debentures would be a special form of currency, having a single use, and they would not at all affect the figures of the customs service. The real result would be that the Treasury, paid by its own obligations, would that much be short at the end of the year, precisely as if the money had been directly appropriated and paid out as an export bounty. It will be seen that for this reason the proposal was from the point of view of constitutionality strikingly like that for the issue of Treasury notes to which John Quincy Adams had successfully objected more than ninety years before.

It differed, however, in that the Treasury note bill originated in the Senate. That was also the case with the Cotton Futures law which Judge Hough held unconstitutional in *Hubbard v. Lowe*. Furthermore, as the Cotton Futures bill left the Senate, it was constitutionally unobjectionable. The remarkable thing there was the fact that the bill became unconstitutional by reason of a money amendment added by the House. When it became law it was a revenue bill within the purview of the Constitution, and it had not originated in the House. Judge Hough explained this apparent anomaly by saying "Though an amendment may be the most important part of an act, it remains formally only an addition or subtraction; it has no independent parliamentary vitality." Wonder may be permitted as to what would follow if this were applied to all House bills.

amended in the Senate. Do they in reality have the constitutional status of their original form? If so, it would be perfectly simple for a Senate to originate all the revenue provisions it chose. All it would have to do would be to tack revenue clauses on the first House bill that came handy.

### RIDERS

Amendment has been the chief method, though not the only method, for working that legislative abuse known as the "rider." Any system of lawmaking whereunder a measure must have more than one approval, invites the attempt to carry a doubtful proposal by attaching it to a measure more likely to win the favor of the other House or of the Executive. Horsemanship naturally suggested that a measure thus carried through on the back of another should be called a "rider." The burden is most commonly mounted on appropriation bills because necessity or strong desire makes them most likely to prevail. Although the "rider" may be put on the saddle by the introducer or the committee, it is nowadays generally seated by way of amendment.

In theory a rider on a money bill is perfectly consistent with the ancient doctrine that grants of supply might be made on condition — the bargain principle on which Parliament was founded. Nothing obnoxious in this appears to have been discovered until the days of the Stuarts. Up to that time the important quarrels had been chiefly between Parliament and the King. Then as the Crown waned and the Commons waxed in power, the field of controversy gradually shifted, bringing disputes between Commons and Lords to the fore. It was under Charles II that the tacking of other matters to bills of supply became serious. Of course the Lords objected. They fought against the dangerous and unfair practice for half a century before common-sense prevailed and it became admitted that the thing was unwise. In 1700 a particularly annoying instance of abuse greatly disgusted William III. The Commons tacked a bill for the appointment of certain Commissioners on a bill granting the land tax. William gave a reluctant assent, prorogued Parliament without making a speech from the throne, and wrote to a friend: "This has been the most dismal session I ever had."

The protest of the Lords was both severe and just. "The

joining together in a money bill things so totally foreign to the methods of raising money, and to the quantity or qualification of the sums to be raised," they said in 1699, "is wholly destructive of the freedom of debate, dangerous to the privileges of the Lords, and to the prerogative of the Crown. For by this means things of the last ill consequence to the nation may be brought into money bills, and yet neither the Lords nor the Crown be able to give their negative to them, without hazarding the public peace and security."<sup>1</sup> Three years later they reiterated their view, declaring that "the annexing any clause or clauses to a Bill of Aid or Supply, the matter of which is foreign to, and different from, the matter of the said Bill of Aid or Supply, is unparliamentary, and tends to the destruction of the constitution of this government."<sup>2</sup>

Hatsell, writing in the latter part of that century, observed. "Whenever this measure of tacking to a Bill of Supply is attempted by the House of Commons, with an intention of thereby compelling the Crown or the Lords to give their assent to a Bill which they would otherwise disapprove of and reject, it is highly irregular; and it is a breach of those parliamentary rules and orders, which have been established by long and uniform practice between the two Houses, in the mode of passing Bills." De Lolme, writing about the same time, says the Lords had made it a standing order to reject upon sight all bills that were tacked to money bills.<sup>3</sup>

Riders, though not common, were not unknown in the American colonies. For instance, in 1754 the Virginia House of Burgesses, passing a bill appropriating £20,000 for the protection of the colony against the French, attached to it a rider setting aside £2500 for paying Peyton Randolph for a mission to England. The Council refused to pass the bill with the rider and the House refused to pass it without. Rather than yield, the House allowed the expedition to be given up, much to the chagrin of the Governor. The North Carolina Assembly in 1759 inserted in the supply bill a provision for the appointment of an agent.

The Maryland Assembly put into an act for the inspection of tobacco, sections limiting fees of officers. Perhaps it was a qualm of conscience over that sort of thing which led the

<sup>1</sup> Hatsell, III, 223 (ed. of 1818)

<sup>2</sup> *Ibid.*, II, 219 (ed. of 1818)

<sup>3</sup> *The Constitution of England*, bk. II, ch. 17.

authors of the new Maryland Constitution in 1776 to take thought against the evils the practice might produce. Permitting the Senate only to assent or dissent in the case of money bills, they went on to say "That the Senate may be at full and perfect liberty to exercise their judgment in passing laws — and that they may not be compelled by the House of Delegates, either to reject a money bill, which the emergency of affairs may require, or to assent to some other act of legislation, in their conscience and judgment injurious to the public welfare — the House of Delegates shall not, on any occasion, or under any pretence, annex to, or blend with a money bill, any matter, clause, or thing, not immediately relating to, and necessary for the imposing, assessing, levying, or applying the taxes or supplies, to be raised for the support of government, or the current expenses of the State." When the Constitution of 1851 gave each House the right to originate any kind of bill, of course this became superfluous and was omitted, but as a model of prudent provision on the subject, it should not be forgotten.

Delaware doubtless had the same purpose in mind when in 1792 it directed that no matter or clause whatever, not immediately relating to and necessary for raising revenue, should be in any manner blended with or annexed to a bill for raising revenue; but inasmuch as the mischief is done by the use of bills for spending money, not those for raising it, the provision could not have amounted to much. It was replaced in 1897 by the general requirement that no bill or joint resolution, except bills appropriating money for public purposes, shall embrace more than one subject. This has been the favorite way of getting at the evil since New Jersey in 1844 set the example in her first Constitution by saying, "Every law shall embrace but one object." That principle has now been adopted by about four fifths of the States.

Unmodified, the New Jersey phraseology might be construed to prevent a general appropriation bill, including many items of outlay. In various ways it has been sought to avoid this and clarify the procedure. New York, acting two years after New Jersey, merely directed that private and local bills should not contain more than one subject, and two years later Wisconsin copied New York. Iowa in 1846 and California in 1849 imitated New Jersey, as did Ohio and Indiana in 1851, and then other States, somewhat blindly, until Pennsylvania cleared up doubt

in 1873 by specifically exempting general appropriation bills from the one-subject requirement. About a dozen of the Constitutions now specify that appropriations outside the general appropriation bill or other than ordinary in character shall be made by bills embracing but one subject.

Illinois, in 1848, attacked one phase of the evil by forbidding in the case of bills making appropriations for the pay of members and officers of the General Assembly, and official salaries, any provision on any other subject — a method of protection that appealed to Oregon (1857), Florida (1868), West Virginia (1872), and Nebraska (1875). In Oregon, however, the restriction was weakened by coupling with salaries "other current expenses of the State."

Mississippi in 1890 was more straightforward and comprehensive in its attack, saying that "legislation shall not be engrafted on appropriation bills, but the same may prescribe the conditions on which the money may be drawn, and for what purposes paid." Four years later New York put in its Constitution: "No provision or enactment shall be embraced in the annual appropriation or supply bill, unless it relates specifically to some particular appropriation in the bill, and any such provision or enactment shall be limited in its operation to such appropriation." Speaking of the operation of this amendment, C. Z. Lincoln, in his "Constitutional History of New York" (III, 245), says an examination of the laws passed since this provision was included in the Constitution will show that the Legislature has not given it a strict construction. "Appropriation bills quite often go to the Governor after the Legislature adjourns, and he is therefore unable to eliminate provisions which could be fairly classed as 'riders,' but must approve them or veto the whole bill."

In Connecticut it is provided by statute that no general legislation can be attached to an appropriation bill.

That form of rider which comes by way of amendment was put under the ban as long ago as 1799 by Kentucky, which restricted the power of the Senate to amend revenue bills, a power granted in her first Constitution, by adding — "Provided, That they shall not introduce any new matter, under the color of an amendment, which does not relate to raising a revenue." Louisiana (1812) copied this, and Maine (1819) said the same thing with slightly different order of words. Louisiana

dropped the restriction in 1879 when making the general requirement that no act shall contain more than one subject. Other States seem to have felt no need of constitutional provision in this particular until Pennsylvania in 1873 put forth that revision which has won the imitation of so many writers of *Constitutions*. Therein it was declared: "No bill shall be so altered or amended, on its passage through either House, as to change its original purpose." Within three years this was copied by Arkansas, Alabama, Missouri, Texas, and Colorado, and since then it has met the approval of seven other States.

All told there are but half a dozen States without constitutional provisions that in some degree directly or indirectly hamper riders. All but one of these half dozen were among the thirteen that originally made up the Union. If they have not the best half dozen Legislatures in the land, it would at any rate be safe to say that no other half dozen excel them. Elsewhere is the presence of restraint in this particular as in so many others, cause, or effect, or merely symptom? Something of each, might be the answer.

Whatever the explanation or justification, the thing itself is in the net result at least unfortunate, for it brings into the statute book that worst of evils, uncertainty. By throwing doubt on the constitutionality of many statutes, it invites litigation. Furthermore, in the lawmaking body it encourages evasion. That is seldom difficult, and resort to it brings the fundamental law into contempt. For this reason it would seem that far better is the course which, for instance, has been followed in Massachusetts. There the evil of riders does not exist because it would not be tolerated. Legislative sentiment is against that sort of thing. A healthy self-respect prevents it. In this direction only is to be found the substantial basis for an honest, fair, and decent system of legislative procedure.

Riders were almost unknown in the early years of Congress. The first important instance of tying together unrelated subjects was that of the Missouri Compromise of 1820, when the Senate coupled in one measure the bills for the admission of Missouri and Maine. To be sure, after agreement had been reached the bills were uncoupled and went separately to the President, but the possibilities in this form of coercion were not forgotten. In resorting to them the pressure has been almost altogether exerted by the use of appropriation bills. By



1835 the delays caused by injecting legislation into these bills had become serious and John Quincy Adams in the course of discussion suggested that they be stripped of everything save appropriations, thus once more exhibiting his characteristic good sense. A fortifications bill had failed in the preceding session because the Senate would not agree to a provision in the nature of legislation. Change in the rules was proposed, but not then made.

However, the matter soon after came to a head through the unsuccessful attempt of Mercer in 1836 to tack to the diplomatic appropriation bill an amendment for distributing among the States surplus funds in the Treasury, a proposal repeated soon after (February, 1837) by Bell of Tennessee, who induced the House to put such a rider on the fortifications bill. This caused the loss of the bill, for the Senate would not yield. The next Congress, in September, agreed to a rule keeping out of general appropriation bills provision "for any expenditure not previously authorized by law." That was quickly found in practice to be more drastic than the spirit of reform could maintain, and in 1838 the bars were let down by adding — "unless in continuation of appropriations for such public works and objects as are already in progress and for the contingencies for carrying on the several departments of the Government."

Under this the House lived for something more than a generation. It will be observed that only the riders in the nature of appropriations were hampered. Extraneous matter could still be injected. Thus in 1855, when the slavery issue had brought the new Republicans into Congress, the "Anti-Nebraska" men succeeded in tacking to the army appropriation bill a proviso forbidding the use of Federal troops for the enforcement of territorial law in Kansas. Of course this was denounced by the Democratic Senators and President Pierce as revolutionary, but the young champions of the new era stoutly maintained that the Representatives were but exercising the ancient right of Englishmen when they imposed conditions on making grants. "It is a power," William Pitt Fessenden declared, "essential to the preservation of our liberties."<sup>1</sup>

Up to that time the rider had been chiefly if not wholly used by one House to coerce the other. It was the conflict with President Johnson that turned the weapon to the use of the two

<sup>1</sup> *Cong. Globe*, App., 1st Session, 34th Congress, 1096

Houses of Congress against the President With its help they made him almost powerless So effective was the device found that Congress could not resist the temptation to use it even after Grant's election brought the appearance of harmony between the Legislative and the Executive One notable case was that of what was called the Salary Grab of 1873, which the Legislative, Executive, and Judicial Appropriation bill carried through to safety. It is said that up to 1875 there were 387 riders attached to appropriation bills.

Then with laudable purpose came a notable change in the House rule, proposed by William S Holman, who gave it his name, and asked for by Samuel J. Randall and James A. Garfield. It was in 1876 that the Holman amendment authorized general appropriation bills to contain or by amendment to receive germane clauses retrenching expenditures The old rule had been construed to permit increases of salaries, but not decreases The change speedily brought great savings to the government, but it opened the door still wider for abuses. These brought political crisis in 1878 and 1879 in the shape of exciting conflict between the Democrats in Congress and the Republican President over his attempt to prevent the intimidation of negro voters in the South Bill after bill the President vetoed because they carried riders aimed at the federal election laws and the use of the army to enforce the obnoxious restraints.

In his veto messages Mr. Hayes argued strongly against the rider practice Admitting that all parties when in power had adopted it, he went on to say, in his veto of April 29, 1879: "Many abuses and great waste of public money have in this way crept into appropriation bills The public opinion of the country is against it. The public welfare will be promoted in many ways by a return to the early practice of the Government and to the true principle of legislation, which requires that any measure shall stand or fall according to its own merits. If it were understood that to attach to an appropriation bill a measure irrelevant to the general object of the bill would imperil and probably prevent its final passage and approval, a valuable reform in the parliamentary practice of Congress would be accomplished."

Interest may further be found in observing the President's view of the theory that in our Constitution had been embodied the ancient English doctrine of the control of the purse by the

popular branch. He held that to establish this theory would be to make a radical, dangerous, and unconstitutional change in the character of our institutions "It was not the intention of the framers of the Constitution that any single branch of the Government should have the power to dictate conditions upon which the treasure should be applied to the purpose for which it was collected. Any such intention, if it had been entertained, would have been plainly expressed in the Constitution. The new doctrine, if maintained, will result in a consolidation of unchecked and despotic power in the House of Representatives. A bare majority of the House will become the Government. The Executive will no longer be what the framers of the Constitution intended — an equal and independent branch of the Government. It is already the constitutional duty of the President to exercise his discretion and judgment upon all bills presented to him without constraint or duress from any other branch of the Government . . . No single branch or department of the Government has exclusive authority to speak for the American people . . . The enactment of this bill into law will establish a precedent which will tend to destroy the equal independence of the several branches of the Government. Its principle places not merely the Senate and the Executive, but the judiciary also, under the coercive dictation of the House. The House alone will be the judge of what constitutes a grievance, and also of the means and measure of redress."

Still persisting, on the 4th of May, 1880, he vetoed another bill solely on the ground of its following "the dangerous practice of tacking upon appropriation bills general and permanent legislation." As to the merits of the legislation in this particular bill he said not a word.

When the rules of the House were revised in 1880, the Holman provision was recast somewhat, but objectionable riders still being possible, in 1885 the House went back to the old rule as it was shaped in 1838, with the exception that instead of permitting provision "for the contingencies for carrying on the several departments of the Government," it was declared that no provision changing existing law should be in order in any general appropriation bill or in any amendment thereto. The Democrats were not satisfied with this, and from 1891 to 1895 they kept the House under the form adopted in 1880, but with the return of the Republicans to power, the drastic prohibition

of 1885 was replaced. In 1911 this was further strengthened by provision that "no amendment shall be in order to any bill affecting revenue which is not germane to the subject matter in the bill, nor shall any amendment to any item of such bill be in order which does not directly relate to the item to which the amendment is proposed."

Anybody who enjoys the study of the science of hair-splitting may find abundant entertainment in the discussions and decisions these rules have produced, and he will rise from his researches with higher respect for the ingenious capacities of the Congressional mind. He will find that the Senate has been little if any behind the House in quibbling, but it has gone along somewhat different lines. The two branches differ in one rather important matter of parliamentary law. The Senate is almost if not quite the only parliamentary body in this country adhering in any degree to the English belief that an amendment need not be germane. The English theory is that in amendments the form of words only, and not their substance, is concerned. Jefferson put the principle in his Manual, justifying it by saying that if the presiding officer were permitted "to draw questions of consistence within the vortex of order, he might usurp a negative on important modifications, and suppress, instead of subserve, the legislative will." His fears were unfounded, for often with little difficulty and rarely with harm nearly all American presiding officers now apply special rules requiring amendments to be germane. The Federal Senate, still clinging in theory to Jefferson's Manual, thereby in this particular gets a decided advantage over the House, for save in one particular it can take a House bill and add to it or substitute for it anything wanted, whether relevant or not. Judicial support of such interpretation of parliamentary law may be found in the Cotton Futures case, where Judge Hough said. "Though an amendment may be the most important part of an act, it remains formally only an addition or subtraction."<sup>1</sup>

The distance to which the Senate can go may be illustrated by the rescue of the proposed Home Loan Bank system on the night of June 16, 1932, just as the session was about to end. The bill had passed both branches, but an appropriation was necessary to get the system started. Were that postponed to the next session, it would be fought and might not be granted at all, in

<sup>1</sup> Hubbard v. Lowe, 226 Fed. Rep. 135 (1915)

which case the earnest labor of many men for many months would have gone for nought. One objection would under the rules compel the appropriation proposal to lie over and a weary, hot Congress was determined to adjourn the session that night. In this critical juncture Senator Jones moved to take up a bill relating to Virginia Avenue in the District of Columbia. It had passed the House and a similar bill had been favorably reported by a Senate committee. The enemies of the Home Loan bill being taken unawares, nobody save one friend of Virginia Avenue objected, whereupon the Senate struck out everything after the enacting clause of that bill and substituted an appropriation for the Home Loan system. The House passed the altered bill and this system was able to function forthwith.

In the matter of appropriation bills the Senate has a rule reading in part "No amendment which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto, and all questions of relevancy of amendments under this rule, when raised, shall be submitted to the Senate and be decided without debate." This, it will be seen, raises the question of what is general legislation and what is not, a most difficult question, as is attested by the frequency with which in the Senate it has aroused controversy. A door of easier escape is found in another rule, construed by precedents to permit suspension of that against riders, upon a two-thirds vote made pursuant to one day's notice in writing.

A foreigner reading the Senate rules might innocently infer that riders must be few and far between. Rarely conclusions would be more wide of the mark. Senator Thomas said in the Senate, January 13, 1915: "I think I am within bounds when I assert that fully fifty per cent of the objectionable legislation of Congress is in the form of riders or amendments that are not germane to the title of bills to which they are attached." This he declared to be a great abuse of legislation. He likened the procedure to an action instituted in the courts for the collection of a note and ending in a decree of divorce. In the 65th Congress (1917-19) appropriation bills that became law carried legislative provisions as follows. Sundry Civil, 52; Naval 68; Legisla-

tive, Executive, and Judicial, 5, Fortifications, 9; General Deficiency, 4, Army, 89, Revenue, 32; Second Deficiency, 7; Post Office, 18, Second Legislative, Executive, and Judicial, 8; Rivers and Harbors, 4; total, 296. That was the War Congress and allowance should be made accordingly, but the record of the next Congress (1919-21) with a total of 223 legislative provisions on appropriation bills that became law, suggests that even in peace times rules do not always rule.

Their insufficiency was discussed in the House, July 31, 1919, by two former Speakers, veterans in legislative experience, of opposite political faith. Champ Clark asked: "Does not the gentleman think the House of Representatives ought to pass a rule that it will not entertain an amendment from the Senate proposing legislation on an appropriation bill unless it comes to us with a two-thirds vote of the Senate, or something of the sort, to stop this everlasting rider business?" The House applauded and "Uncle Joe" Cannon answered: "Well, yes, that or something equivalent to it. But the Senate is not the only sinner in the matter of riders. I think it safe to say that three quarters of the legislation of the House is placed on appropriation bills either by special rule, amendment by the Senate, or by unanimous consent." Thereupon Mr. Clark queried: "Does not the gentleman think the House ought to pass a rule providing that the Committee on Rules shall not report to the House a rider on an appropriation bill?" To which Mr. Cannon replied: "Well, I think that is one remedy. But we come down here, 435 of us, and instead of each committee being an intelligent committee, all considering matters of legislation and reporting them to the House and letting the House pass on them, so that they may be enacted or may fall upon their merits, the sin is that with slight consideration legislation comes in, in the shape of a rider, and gentlemen, not after full and intelligent investigation, take it for granted that the Committees on Appropriations, or some one of them, have considered it, and that they — the committees — know better than we do, and the matter not having been investigated by the proper committee that has charge of the legislation, there is much bad legislation or imperfect legislation that is finally enacted."

Do not suppose that the evil is peculiar to the United States. It seems to be a parasite on all parliamentary government. The new Commonwealth of Australia found need for putting into its

Constitution exceptionally minute and specific precautions against "tacking" extraneous matters to finance bills.

From all this it would naturally be inferred that there is nothing to be said in defense of riders. Yet when men who are for the most part by nature law-abiding and who realize the importance of orderly parliamentary procedure, over and over again join in tacking riders on appropriation bills, there must be at least some shadow of justification. It is to be found in the fact that this is a short cut, sometimes the only feasible way, to get legislation believed to be needed at once. Our legislative processes have been framed on the theory that it is more important to prevent mischief than to get action. Their slow, clumsy machinery now and then goes beyond the bounds of endurance. There are times when pragmatism outweighs principle.

## CHAPTER XV

### METHODS OF CONTROL

THROUGH centuries Englishmen were accustomed to see their Parliament grant money to the King to be spent as he saw fit. Certain continuing revenues were assigned to him without conditions, and other grants were based on nothing but expectation as to their use. With the Stuarts came birth of the idea that Parliament should have some authority in this matter. Before the Stuarts had passed from power the House of Commons had won the right to prevent money from being spent except as it wished. The next step might have been the securing of the right to choose the objects on which to spend money, and there were attempts at that in the early years of the 18th century, when the presence of unexpended balances in the exchequer proved a temptation to members of the House. Had it not been resisted, the right to initiate expenditure, which under most constitutions accompanies the right to direct its application, would have been acquired by the House.<sup>1</sup>

Instead came the oldest of the standing orders of the House of Commons, July 11, 1713, which read. "This House will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue... unless recommended by the Crown." Thus was established the practice permitting neither the introduction of any new matter in the budget nor the increase of any item by amendment, if objectionable to the Ministry. This was in strict conformity with the ancient doctrine that the House grants a request of the King, now represented by his Ministers. Theoretically nothing can be granted that is not asked, nor any more than is asked. Practically it works out so as to give the Executive almost complete control of the financial program, for the doctrine extends to matters of revenue as well as appropriation, and furthermore motions to reduce taxes avail as rarely as those to lessen expenditure.

However, individual members are not wholly helpless. Even though they believe a proposed expenditure is too small, they

<sup>1</sup> G. F. Campion, *An Introduction to the Procedure of the House of Commons*, 29.



may move to reduce it, thus precipitating discussion in the course of which they will get the chance to point out why it is insufficient. Questions on the floor may make it awkward for the Ministry to refrain from submitting an estimate of further expenditure. A resolution may impose on the Government the moral obligation to ask for more appropriations sooner or later. Even new outlay may sometimes be compelled, for a measure may contain the provision — "Expenditures to be paid from funds which *shall* be appropriated by Parliament." Members may individually importune ministers to aid this or that undertaking. These methods of indirect initiative have gone so far that governments have frequently complained of their effect on expenditure, and have used them as an excuse for throwing on Parliament the responsibility for extravagance.

Yet on the whole the system of ministerial responsibility remains unshaken. Englishmen defend it by saying that it guards the Commons against the unwise liberality of their own members as well as against importunities from other quarters, and that moderation as to the amount of the public expenditure, and care and judgment in the detail of its application, can be expected only when the executive government, through whose hands it is to pass, is made responsible for the plans and calculations on which the disbursements are grounded. They think it wise that the limit of expenditure should be fixed by men who have their retention in office distinctly at stake, and so have the strongest motives for economy, at least whenever the life of a Ministry is dependent on no question interesting the country more than that of finance.

The doctrine was applied to Canada, the Dominion Constitution saying "It shall not be lawful for the House of Commons to adopt or Pass any Vote, Resolution, Address, or Bill for the Appropriation of any part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed." France, nominally adopting Cabinet Government, was unwilling to apply this of its features. The Budget Committee usurped the right to revise the proposals of the Ministers, sometimes completely transforming them, and then the report of the Committee might be made over by amendments in the Chamber. This led in or soon after 1900 to a rule providing that no amend-

ment to the budget nor any additional article tending to increase expenditure might be submitted after the three sittings following the distribution of the report on the chapter concerned. No proposal tending to increase salaries, indemnities, pensions, or to create new offices or pensions, or to establish them beyond their present limits, might be made in the form of an amendment to the budget or of an additional article. Even this half-hearted restriction has aroused opposition from those who think legislative rights should be unrestrained, and it may be swept away.

In Germany under the Emperors a member of the Reichstag might make any motion he wished in reference to the finance bill. However, he had to secure the signature of fifteen other members to his proposal and submit his motion upon the second reading of the bill. It was a moot question whether items that called for new expenditures might be inserted in the budget or whether the amounts for items already provided for might be increased. In practice increases were made only with the consent of the Government and proposals for expenditures were examined by a committee. Even the right of refusing items was infrequently used. Interpellations were frequently resorted to, especially in the lower House, and it was thus that the Government was subjected to a searching questioning respecting its fiscal policies. What may have been the full practice under the new Constitution has not come to my knowledge, but the document itself said that the National Assembly might not increase appropriations in the budget bill nor insert new items without the consent of the National Council, save that if the Council disapproved, the Assembly might by a two-thirds majority have its way. In Prussia, by the Constitution of 1920, the Council of State was to have absolute veto of any appropriation in excess of the budget recommendation of the Ministry and the referendum could not be invoked.

The American colonies were settled at various stages of the parliamentary development in England. By force of circumstances the earliest assemblies began with initiating legislation. After it had been decided in England that the Crown should begin the process of appropriating money, naturally colonial Governors tried to assert that prerogative. As they and their Councils were more extravagant than suited the notions of the colonists, prolonged and bitter contests with the lower Houses

followed. In New York, for example, the first step taken by the Assembly was to make appropriations specific, which was at the outset done by adding the words "for no other intent whatsoever" to the clause stating the general purpose of the appropriation. In later acts the appropriation was itemized, with specification of the purpose for which every component sum was to be used.<sup>1</sup>

The first American States to take any step toward adopting the English idea were those that tried to go out of the Union. The Confederate Constitution forbade Congress to appropriate money except by a two-thirds vote of both Houses unless it was requested by the head of a Department and submitted by the President, or was asked for the payment of its own expenses or of claims against the Confederacy declared by a judicial tribunal to be just. It may not be unfair to infer that this did not work well, for none of the Confederate States put it into the Constitutions they framed on resuming their allegiance to the Union.

Little was heard of it until the budget program was urged. Chairman Fitzgerald of the Appropriations Committee proposed to the Democratic members of the Committee on Rules in the 62nd Congress, to forbid amendments increasing committee recommendations above the estimates of the Departments, or proposing appropriations where no estimates had been submitted, but the suggestion was not adopted. Later he said he would have supported such a rule extended to the committees themselves, he was convinced that even more radical changes would be imperative. Before a committee of the New York Constitutional Convention in 1915 he supported the same general view. That Convention embodied it in the Constitution which went by the board because submitted as a whole. It would have given the Legislature power only to reduce items in administration appropriation bills, and would have required new items to be submitted in separate bills. This was incorporated in the Maryland budget amendment, but was rejected by the Massachusetts Convention, the amendment submitted and adopted in that State reading. "The General Court may increase, decrease, add or omit items in the budget." Nebraska, providing for a budget in 1920, required for increasing any item a three-fifths vote, the same vote that is necessary there to pass a bill over the Governor's veto. Provision on the subject was

<sup>1</sup> Herbert L. Osgood, *The American Colonies in the Eighteenth Century*, I, 242.

absent from the budget bill passed by Congress in 1920 and vetoed by the President, as well as from that subsequently enacted. Thus what is called "the executive budget" was rejected for the nation. Since then there has been no serious proposal for its Federal adoption.

Here is the heart of the budget controversy. No reasonable man, unless he objects on principle to any and all change of accustomed procedure, will object to a systematic, orderly, comprehensive presentation of the needs and resources of the government, as viewed by the executive branch. Few men will see important harm in having the President or Governor give such a presentation his approval, for what it may be worth, even though it gets thereby the weight of the prestige of his office. Many men, particularly if they have served in Legislature or Congress, will seriously oppose taking away from the legislative branch any of its power of originating or amending.

The controversy is fundamental. It goes to the very roots of political science. It aligns on one side those who turn their faces toward autocracy, on the other those who look with hope toward democracy. It contrasts the virtue of centering responsibility on one man, with the dangers of giving to many the power over the purse. And it contrasts the virtues of determining the popular will by the processes of representative government, with the dangers of leaving decision to the prejudices and ignorances of an elected monarch. These, to be sure, are the extremes of the argument, not convincing in themselves, but of weight as tendencies. Between them are more practical and immediate considerations that are likely to determine action.

These considerations make the problem one of degree. The general admission being that we may wisely give the executive branch a somewhat larger share in public finance, the instant question is as to how far we may safely go. One rises from a perusal of the admirable documents issued by the Bureau of Municipal Research, the report of President Taft's Commission on Efficiency and Economy and the utterances of Mr. Taft himself, the writings of President Wilson, the statements of President Lowell of Harvard and President Goodnow of Johns Hopkins, the arguments of Professors Cleveland and Beard and Ford, with the impression that there is in this country a body of opinion having no small weight and consequence that would approve going nearly if not quite to the distance of the English Cabinet

system, whereunder the executive branch determines public finance subject to the approval of the legislative branch. Yet whoever will read the debate on the budget in the Massachusetts Constitutional Convention of 1918 may satisfy himself that a body of opinion still stronger, not by reason of names, for its spokesmen are mostly without fame, but by reason of its manifest reflection of the sentiment of the mass of the people, will resist to the last any attempt to abandon the basis of American institutions, that system of checks and balances under which neither legislative nor executive shall be dominant

It is, therefore, with no concession of principle, but from motives of expediency, that those who are willing to modify our practices somewhat, but not radically, approach the budget problem. The point where they part company with their more extreme friends is this of the power of the legislative branch to increase or add items.

Those who argue for the full executive budget dwell on the desirability of centering responsibility on one man, the Governor or President, that the people may know who should be blamed and punished for bad judgment, extravagance, waste. The rejoinder is that this may very well be wise in matter of policies, but that in matter of detail it is impracticable, unfair, ineffective, useless

Of like nature is the argument that the visible, open leadership of an Executive is to be preferred to that of a committee chairman or a legislative boss. The word "boss" is thus used invidiously, often describing the leader of the faction or party to which the user does not belong. Where a really obnoxious "boss" is to be found, of course the leadership of an Executive is preferable. In a Legislature like that of Massachusetts where there is no such thing, the argument is vain. As for a committee chairman, his leadership may be preferred in case he really knows more about the matter than anybody else, which is often the fact. Frequently — indeed it would not be rash to say ordinarily — the Chairmen of the Committees on Ways and Means, Appropriations, Finance, or whatever it may be, of Legislature or Congress, know much more about the public business than Governor or President. There is no assurance whatever that the people will choose for an Executive a man with financial instinct or having intimate acquaintance with administration. Committee Chairmen in the Legislatures, on the contrary, are usually

appointed with at least some regard to their qualifications for the particular work

It is averred that President or Governor represents all the people and will therefore distribute the public outlay more equitably. An all-wise Executive would meet that expectation, but unfortunately Executives must rely largely on a few advisers, mainly administrative officials, who have sympathies and prejudices like other folks. It is probable, too, that no one man will respond to the needs of all parts of a State or Nation with the accuracy of a representative body chosen by districts. Here again while excelling in matter of policies, the Executive may be deficient in matter of details. Undoubtedly, however, his freedom from local pressure is to be recognized as in some aspects a gain, and this justifies his veto power while not warranting a monopoly of the initiative.

Of late years the power and pressure of minority groups have brought to the front the contention that only the barrier of the Executive can prevent raids on the public treasury. Most conspicuous of the dangers have from the days of ancient Rome been those found in disbanded armies. After our Civil War, those of the North, organized as the Grand Army of the Republic, had their way with Congress for a generation. After the World War, the powers of the Presidents did not suffice to prevent extravagant appropriation. Presidents Harding, Coolidge, and Hoover between them vetoed eleven bills that would have given more money to veterans, and five were passed over their vetoes. When the depression made economy imperative, that altogether admirable Director of the Budget, Lewis W. Douglas, with the backing of President Roosevelt, managed to get great reductions, but the American Legion at once began bringing pressure to bear on Congress for restorations, and in March of 1934 Congress again surrendered to the veterans' organizations, the House overriding the President's veto by a vote of 310 to 72, and the Senate with a narrower margin.

The danger from group strength led so well-balanced an observer as Walter Lippmann to pronounce that "only by leaving to the executive the power to initiate expenditure can the national interest as a whole be effectively protected against the pressure of minorities. In the equilibrium between these two powers, of the Executive to ask and the Legislature to grant funds, lies the hope of constitutional liberty."<sup>1</sup> Returning to

<sup>1</sup> *New York Herald-Tribune*, March 16, 1934

the same theme ten months later, when President Roosevelt in his budget message had recommended that four billion dollars be appropriated in one sum, to be allocated by him for giving work to those unemployed on the relief rolls, Mr. Lippmann said: "One of the chief causes of the weakness of democratic governments in the world has been the disorder resulting from legislative initiative in financial affairs. Countries where the executive retains the initiative, such as Great Britain, have weathered the crisis without serious damage to their institutions. Countries, like France, where parliament has until recently had the initiative, have been threatened with dictatorships as the only cure for legislative irresponsibility. For us, in view of the audacity of the spending program, it is of absolutely first importance that the initiative in proposing expenditure should be centralized in the President."<sup>1</sup>

What followed would militate against Mr. Lippmann's view. In the course of nearly three months of controversy, while there were those who sought to increase the appropriation, it became clear that much more serious was the wish of Representatives and Senators to lessen it greatly, and could there have been a secret ballot in the Senate, it is possible that wish would have been put into effect. As it was, Congress refused to give to the President the full authority he had asked.

Of course the danger of extravagance by the lawmaking branch must be admitted. There are two rejoinders. First, that danger has threatened repeatedly since our form of government was adopted and thus far has been met without destructive injury. Secondly, it is not clear that one-man power would not do the greater harm in the long run.

The assumption that President or Governor will always rise above considerations of personal or party advantage, is to be challenged. Give him the means of control and he may use the whip-hand to drive members at his pleasure. By threatening to refuse the just demands of some locality or section, he may coerce its representatives into unwise bargains having political ends. His motives may be disinterested and yet dangerous. I have seen a Governor so prejudiced against an important State institution that with perfectly sincere purpose he would have sadly crippled its usefulness could he have controlled the appropriation. The power to cripple or kill is too serious to be put

<sup>1</sup> *New York Herald-Tribune*, January 10, 1935

within the grasp of any one man. Quite enough is it to give him the power to recommend in budget form, since no committee would dare go above his recommendation save for reasons urgent and clear.

Each side uses the argument that it is the more anxious to keep down expenditure. For instance, President Taft was reported in the "New York Times" of October 13, 1915, as having said at Columbia University that the Chief Executive is most likely to feel the need of economy. "Those who are least moved by anxiety as to the totals are the members of the legislative branch, who are struggling to get as much money as they can out of the general Treasury for their local constituencies." On the other hand Clarence W. Hobbs, Jr., a veteran legislator of sound judgment and temperate habit of thought, pointed out to the Massachusetts Convention of 1918 that Governors not infrequently follow their abstract recommendations of strict economy with proposals involving the expenditure of millions of dollars. He thought it the main virtue of the budget that the Governor would have to show what his proposals would cost and where the money would come from to put them in effect. Said he: "I think it can be stated fairly that in the last eight years or so the main impulse for economy has not come from the executive chamber."

Had Mr. Hobbs extended his examination to the whole field of American public life, he might have concluded that such a phenomenon is common and natural. There are more votes in outlay than in retrenchment. It does not follow that American Executives frequently and deliberately advise with this in mind. Far the greater part of them are too public-spirited and unselfish for that. Yet all men like the approbation of their fellows and popular favor is essential to the continuance of a political career. Therefore it is but natural, and perhaps on the whole it is desirable, that Executives shall lay the stress on constructive policies. The Chairman of a Committee on Appropriations has less motive for generosity and can prune or destroy with the more safety. He is expected by his fellows to be the watchdog of the treasury. During the session he is the most unpopular man in the House, but at its close if he has tried to do what everybody knows to be his duty, he finds that after all he has won the respect and the good-will, perhaps the admiration, of his associates.

There were other delegates in the Massachusetts Convention



who brought to this specific question of legislative restraint the benefit of their experience and observation Nathan P. Avery, one of the most level-headed members, neither radical nor reactionary, said that for six years as Mayor of Holyoke he had worked with the Board of Aldermen under a charter which said they could not increase budget appropriations "I would rather," he said, "work with a Board of Aldermen which had the power to increase appropriations, and take my chances with a veto." And were he to be Governor, he would rather so work with a Legislature. S. Hamilton Coe, who had watched the budget system at work in Worcester for nearly a quarter of a century, reported that not once had the City Council seen fit to override the Mayor, though having power to increase the amount recommended, and Mr. Coe concluded the veto to be safeguard enough. The views of Mr. Avery and Mr. Coe may be set off against the apprehension of those who predict that without the restraint proposed, the Legislature will ignore the Governor's budget, and will appropriate as it sees fit, with net result much as before.

Professor George B. Churchill of Amherst, coming to the discussion fresh from service as a member of the Senate Committee on Ways and Means of the Legislature of 1918, took strong ground against forbidding the Legislature to increase items. Professor Churchill was recognized as one of the ablest and most high-minded members of the Convention, and the combination of scholarship with legislative experience gave his judgment in this particular exceptional weight. It was noticeable that of the five members of the Committee on State Finance who advocated forbidding increase by the Legislature, not one had served in the General Court, of the ten who opposed, seven were helped by legislative experience. The defeat of the proposal was undoubtedly due to the personal experience of the greater part of the delegates.

Professor Churchill hit the nail on the head when he showed that it was just as desirable to have a check on the Executive as a check on the Legislative. One delegate thought a check could work only one way, and that in the way of reduction. He did not grasp the fact that it may be equally important to check a man who is on the point of being niggardly, or who through ignorance, indifference, or prejudice, is about to sacrifice the public interest. We are supposed to sin equally in doing the

things we ought not to do, and not doing the things we ought to do. So let the checks work both ways. Let us have all possible knowledge, advice, and supervision in matters of public finance. We cannot have too much. We want to increase the total, not merely to redistribute what we now have. Increase the responsibility, the knowledge, the power of President or Governor, but do not lessen that of Congress or Legislature. Systemize but do not shackle.

Finally, what is the equivalent of the absolute veto in matter of expenditure is wholly inconsistent with the American application of the party system. Who that recalls John Tyler and Andrew Johnson can think that the absolute veto in any form will here be tolerated? As long as the legislative and executive branches may be of different political faith, complete domination by the Executive is unworkable, or else representative government disappears. To say that the people speaking through their representatives in General Assembly or Congress may not even by unanimous vote overrule the man chosen to execute the laws, is unthinkable doctrine in a democracy with traditions like ours.

#### CHECKS ON THE BRANCHES

Those who would reform public finance, urging closer relations between the executive and legislative branches of government, seek not only greater control of the legislative by the executive, but also greater control of the executive by the legislative. While Presidents and Governors are trying to check wasteful appropriation, Congresses and Legislatures are trying to stop wasteful expenditure. Laudable as may be the purpose on either side, neither as yet shows much in the way of results to vindicate its encroachments on the doctrine of the separation of powers. Measured merely by authorization, the executive branch is making the more headway. Statutes and constitutional amendments providing for budgets have followed each other fast, but the creation of auditing and controlling agencies drags.

W. F. Willoughby puts the responsibility for this on the legislators. "In no small degree," he says, "the inefficiency and waste that characterize the conduct of public affairs is due to the failure of legislatures to hold administrative officers to a due accountability for the manner in which they perform their

duties Though the obligation is a direct one, legislatures have rarely applied themselves to the problem of working out the means by which it is to be met In no small degree they seem to take the position that they have done their duty when decisions have been reached and orders given " <sup>1</sup>

Observe the confidence of the statement — "The obligation is a direct one" Yet the task is so foreign to the attributes of a lawmaking assembly, that grave doubt arises as to whether this is in fact a normal function of the legislative branch. A few generalities in the Constitutions suggest that their framers conceived it to be such, for instance, the averment in the Massachusetts Constitution that the House of Representatives shall be the grand inquest of the Commonwealth, but nobody knows if this means anything beyond its relation to impeachments. The impeaching power vested in the legislatures and Congress gives more warrant for deducing powers of minor inquiry. Only by inference, however, can the duty or even the right of the legislative branch to supervise generally the work of administrative officials be maintained

Consider the difficulties in the way of control of expenditure. Manifestly supervision cannot be usefully performed by a legislative body acting in full assembly<sup>2</sup>. Only by proceeding through committees or officials can it accomplish anything Parliament uses both agencies — an official, the Comptroller and Auditor General, and a committee, that on Public Accounts The Comptroller and Auditor General inquires whether the sums included in the accounts have been actually spent, and whether the spending was regular. It is not within his province to consider whether the spending was desirable, but the Public Accounts Committee regards it as his duty to draw attention to expenditure that is wasteful or extravagant His exhaustive and independent scrutiny is looked upon as of great value, but complaint is made because he makes formal report to the committee only when the annual accounts of a department are closed The Select Committee on National Expenditure in 1918 expressed the opinion that it would add greatly to the value of the audit and conduce to good government if the attention of the Public Accounts Committee could be called at once to any apparent impropriety, before the expenditure was completed. Also there is criticism because the House does not give definite time to the discussion of the reports of the Public Accounts Committee.

<sup>1</sup> *Principles of Legislative Organization and Administration*, 157.

That committee, secured in 1862 by Gladstone, then Chancellor of the Exchequer, has done most useful work. W. F. Willoughby says that to a considerable extent it is looked upon as the crowning feature of the whole system of British financial administration.<sup>1</sup> With rare exceptions its chairman has been selected from the opposition. Professor Willoughby says this is to emphasize the policy that has been adopted of giving to the work of the committee a non-partisan character. Yet it may be surmised that the zeal of a chairman would not be abated by the fact that he is a member of the minority. At least he would not be hampered by loyalty to an Administration. The Comptroller and Auditor General attends meetings of the committee, and a principal permanent of the Treasury is always present. Colonel Durell, Chief Paymaster of the War Office, says the Comptroller and Auditor General guides the committee and has been described as to a large extent its acting hand. "A committee would probably never be able to detect any official extravagances or scandals unless guided by an official bloodhound who is in their service and with such powers as the Comptroller and Auditor General possesses."<sup>2</sup>

Colonel Durell further says: "It has been stated, indeed, that nothing has a greater deterrent effect on a Department than the fear of having to go before the Public Accounts Committee, and that the accounting departments stand more in awe of this committee than of the House of Commons itself, probably because there is less chance of escaping its close scrutiny." The chairman of the committee told the House: "There is a great deal of human nature in the world, and fear is one of the greatest helps in keeping men straight. The fear of the Public Accounts Committee, and the very searching examination that takes place there, does a great deal to keep in the path of rectitude the members of the civil service."

In Congress the House of Representatives long had committees on the expenditures in the several Departments — one for each. They rarely functioned, but existed chiefly for the sake of imaginary honors in the way of chairmanships and memberships, together with some petty perquisites. Within the House these committees were looked on as a joke. By December of 1929 the

<sup>1</sup> *Principles of Legislative Organization and Administration*, 168

<sup>2</sup> A. J. V. Durell, *The Principles and Practices of the System of Control over Parliamentary Grants*, 115.

need of something more efficacious became so apparent that all eleven of these separate committees were abolished, and a single committee substituted, which was to examine the accounts and expenditures; their economy, justness, and correctness, their conformity with appropriation laws, the proper application of public moneys, and kindred matters. The committee made a brave attempt to do something, but without material accomplishment. If in the State Legislatures any standing committees ever concern themselves regularly with the efficiency of administration, they have not come to my notice.

American experience would not indicate that our legislators have commonly felt it a normal duty, one inhering in their office, to see that the money they appropriate is wisely and honestly spent. How far is their attitude justifiable? To answer, first seek the purposes of inquiry. One, of course, is to disclose wrong-doing in order that the wrong-doer may be punished. This has nothing in kinship with the normal functions of a lawmaking body, and for its accomplishment such a body — partisan, unfair, impulsive when acting as a whole, swayed by mob-spirit, essentially non-judicial — is notoriously unfit.

Committees are not much better qualified to do justice. Observation of investigating by congressional committees should confirm this. Prosecution turned into persecution, the ruthless sacrifice of reputation, the vindictive display of prejudice, the mean debasement of partisanship, the advancement of personal fortunes through the use of scurrilous publicity — these are some of the features that make the whole thing a stench in the nostrils of decent men. Whether or not the fathers were wise in separating the legislative and executive functions, they did no wiser thing than to set off the judicial function by itself.

Committees reach conclusions by processes where the usual safeguards thrown about the accused by the courts are wanting. No rules of evidence are followed. Hearsay is in good standing. Opinion is invited. Leading questions go unchallenged. Rarely are all the men who are to pass judgment, in attendance. What would be said if less than half a jury were in the box when an all-important issue arose? Yet that was why the courts intervened in a Senate "investigation" not long ago. The situation was common, not abnormal. Better no punitive investigation at all, than what takes place now. The net result of the practice is more harm than good.

It interferes sadly with legislative time, especially when overburdened legislators are taken away from legitimate duties for weeks and weeks.

It is costly Representative John J. McSwain, a defender of the practice, inserting in the Congressional Record for April 12, 1935 (p. 5764) a full descriptive list of investigations from March 4, 1921, to June 18, 1934, to the number of 193, reported the total expenditure of the 125 Senate committees to have been \$2,458,822. If that of the fifty House and eighteen joint committees was in the same ratio, the total for all was \$4,745,526.46. If printing expense was not included and if a fair share of what may be called the overhead cost of the Capitol were taken into account, together with the time required of department officials and clerks, the total would probably be more than five million, with an average of nearly \$26,000 for each investigation.

It conduces to trial by newspaper. That runs reputations unjustly. Even if it deters a few rogues in office, it alarms many excellent administrators, leading them to think that in zealous activity danger lies, that the negative attitude is the safer, and thus it discourages ambition and enterprise, thereby fostering the timid, apathetic mediocrity that is the worst feature of every civil service.

Worse yet is the effect on the public mind, by encouraging the dangerous belief that all public servants are knaves. When a people loses faith in its government, then revolution comes.

The power of lawmaking bodies to impose formal penalties is so restricted as to be of small consequence. Impeachment is a long, clumsy process, and fit only for higher officials. Removal from office could in effect be secured by refusal of appropriation for salary, but that would be no such punishment as a court sentence would give. Unless investigation discloses criminal acts of which the courts can take cognizance, the offender is almost sure to suffer nothing but loss of place and reputation. If criminal acts are in question, they are the province of prosecuting officers and the courts. The ascertainment of such acts is for juries to perform, fitting and adequate penalty is for judges to impose.

These are not legislative functions. Indeed, what purpose of inquiry is normally legislative unless it involves the making of a law? To that degree and no farther can legislative audit, whether by full assembly, or by committee, be justified.

Assuming the appropriation of money to be one kind of law-making, it follows that such audit is defensible in case it may lead to wiser appropriation, possibly to statutes defining official duties, regulating conditions of work, prescribing penalties, or in other ways conducing to more efficient administration. The corollary is that if the legislative branch sees fit to make this inquiry through an officer of its own, he may be made subject altogether to its orders, with tenure of office dependent on its pleasure. Indirectly this was brought in question by President Wilson's veto of the Budget bill in 1920. The bill provided for a Comptroller General and Assistant Comptroller General to be appointed by the President with the advice and consent of the Senate, but subject to removal only by a concurrent resolution of Congress — a form of resolution not sent to the President for approval unless containing a proposition of legislation. This hybrid status, half executive, half legislative, might well have received criticism of itself, but the President saw fit to rest his objection on the ground that constitutionally the appointing power carries with it the removing power. Reading between the lines, however, it may not be unfair to infer that he objected to legislative control of the auditing officials. If in fact he did so object and believed his constitutional prerogative invaded, I think he was wrong. Congress might indeed as matter of expediency have left auditing entirely to the legislative branch, but there seems to me to be no constitutional reason why the legislative branch may not have its own servants to do whatever may be thought helpful for the performance of its duties.

The Budget and Accounting Act of 1921 said. "The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds," and shall make report with recommendations relating thereto, and "recommendations looking to greater economy or efficiency in public expenditure." The Committee reporting the bill said that the Comptroller General "could and would be expected to criticize extravagance, duplications, and inefficiency in executive departments." That expectation has not been realized. So far as my observation has gone, no recommendation in accordance therewith has come to Congress. The Comptroller General does not go beyond securing compliance with existing law in the expenditure of money.

The Bureau of the Budget helps some by giving to the Committee on Appropriations reasons for reducing expenditure here and there, but it has not come to my knowledge that it has advised other committees, those that report the authorization of appropriation, as to changes in law that would conduct to economy. What is needed is somebody to inform and advise Congress as to both the law and its operation, with a view to both economy and efficiency.

Some of the States are entrusting the work of supervision to executive officers. Thus Massachusetts has created a Supervisor of Administration. In Illinois the Director of Finance has the power to prevent any proposed expenditure from being made, though within the law, if he thinks that under all the circumstances it is not warranted, for he is authorized to refuse to approve the vouchers. In case of disagreement between the Departments, the Governor is the final authority.

It will be seen, then, that development may be along the line of more power, either to the Chief Executive or to the legislative branch. Parliament prefers the latter. The tendency there is toward closer touch between the Comptroller (who is the critic representing the House of Commons), and the Committee on Public Accounts. As we have seen, that committee has one characteristic not yet imitated in this country. Customarily its Chairman is a member of the minority party. This puts the criticizing power in the hands of those who have the most motive for its exercise. Representative Walter W. Magee of New York, April 6, 1918, when expenditure for the war had become tremendous, brought this to the attention of Congress and proposed a consolidated committee on public accounts. The President, however, disapproved anything like a committee on the conduct of the war, and his party, controlling the House, followed his advice. In the following January as experienced, thoughtful, and conservative a legislator as Frederick H. Gillett (soon afterward to be elected Speaker), in remarks upon the floor gave his adherence to the idea of a permanent and active committee on expenditures, always with a majority opposed to the administration, having the partisan motive to criticize and thus being always at least a constraining force.

Development may come in line with what is going on in municipal affairs. The City Manager plan includes the purpose, though going beyond it with actual management of administra-



tion. It would not be rash to predict that presently our States, and possibly even the Nation itself, will have a Business Manager. He will not supersede but will supplement the Executive. The device of Governor or President will still be used to determine and crystallize public opinion as to broad matters of policy. The Executive will serve as the link between Business Manager and Legislature. He will perform the customary functions of ceremony. He will share in legislation by use of message and veto. But the real work of administration, with its natural concomitant, the budget, will be done by an official appointed on the basis of merit, serving during good behavior, sheltered from partisan politics, and concerned with the task of seeing that the money of the people is wisely and effectively spent.

It is doubtful if any advantage comes in the long run from such restraints on legislative bodies as those requiring a heavier vote for money bills than for others. New York began the resort to this expedient in 1821 by requiring a two-thirds vote of all members elected, for any bill appropriating the public moneys or property for local or private purposes. In 1846 it added that on the taking of the final vote on matters of appropriation, taxation, or debt, the quorum should be three fifths of all the members elected. Two years later Wisconsin copied this Michigan in 1850 took over the two-thirds requirement for local and private appropriations. In the same year Virginia and Kentucky required a majority vote of all elected for final passage of bills making appropriations or creating debts.

Ten or a dozen of the other States have made special requirement of some sort. They have accomplished little. What takes place in New York, suggests the reason. Doubtless it was partly to prove the presence of the three-fifths quorum that the provision of 1846 stipulated the vote should be taken by Yeas and Nays. The "short roll-call" is used. For example, in 1916 the vote on the general appropriation bill took about five seconds. The first and last names on the roll were called, with those of the majority and minority leaders, and a vote of 90 Yeas and 40 Nays recorded. When the general appropriation bill of 1917 passed the Assembly, it was declared to have been carried by a vote of 85 to 45, although only about seventy members were in their seats. No roll-call was taken, the Clerk merely announcing the number of Ayes and Noes. It is said that the

Clerk of the Senate is noted for the speed with which he can read the names<sup>1</sup> "His call of the roll resembled rather a short, whirling sound than, Messrs Argetsinger, Brown, Wagner, Yelverton. Frequently he called only the first three names" How do self-respecting men, sworn to observe a Constitution, excuse this sort of thing? Of course there is no valid excuse, but there is a valid explanation, and that is the revolt of human nature against unreasonable and useless restraints. Once the letter of the law is broken, then somehow men will carry their disregard for it to the extreme of abuse.

Another type of control over legislative action in matters financial grew out of the fear that extravagant Legislatures might commit the State by enormous borrowings. The reckless era of internal improvements, beginning with canal enterprises, continuing as railroads came into use, and culminating in the panic of 1837, brought disaster to some of the State treasures and threatened all. So when Rhode Island framed her first Constitution, in 1842, she said that except in time of war, or in case of insurrection or invasion, the General Assembly should have no power to incur State debts to an amount exceeding \$50,000, "without the express consent of the people", nor without such consent should it pledge the faith of the State for the payment of the obligations of others.

In the previous year Arphaxed Loomis, a member of the New York Assembly, had proposed an amendment to the Constitution of the State providing that no law creating debt should take effect until approved by the people at the next general election, unless in case of invasion, insurrection, or war. This, known in history as "the people's resolution," was at first rejected in the Assembly by a tie vote, but in the following year many citizens petitioned for it and in 1844 support had become so general that the Legislature proposed the necessary amendments. Governor Wright, approving in his message of 1845, found the occasion in what a less dignified document would have described as log-rolling. "It strikes effectually," he said, "at one of the most universal causes of complaint and dissatisfaction growing out of the recent appropriations for our works of internal improvement. I refer to the charge, whether well or ill founded, that combinations of local interests are formed on the part of friends of different works having no natural or

<sup>1</sup> *Municipal Research*, June, 1917, p. 116

necessary connection with each other, and that, in this way, loans are authorized, and appropriations secured, which the intrinsic merits and strength of no single work in the combination could command " The proposal was embodied in the Constitution of 1846, to apply to debt of more than a million dollars.

Meanwhile Michigan by amendment in 1843 had required the referendum on all borrowings New Jersey in 1844 adopted the idea for debt in excess of \$100,000. Louisiana in 1845 put a limit of \$100,000 on State debt, except in case of war, insurrection or invasion. The next year Iowa set the same limit, excepting, however, a borrowing for some single specified object approved on referendum Wisconsin in 1848 said debt should be incurred only for "defraying extraordinary expenditures," and then only by Yea and Nay majority of all members elected to the Legislature, save in case of war, insurrection, or invasion. In the same year Illinois preferred referendum to the people, limiting the freedom of the Legislature to \$50,000, but California, framing her Constitution in 1849 under opulent conditions, set a figure of \$300,000. Nearly all the States have now applied some sort of limitation on the borrowing power of their lawmaking bodies.

In normal times such restrictions may be defensible, but in periods of business depression, when there is great unemployment and destitution, they may become serious hindrances to justifiable public relief In the hard times that followed the collapse of 1929 the result was that the Federal government had to come to the help of the States, with deplorable transfer of local responsibilities to the central government. Nothing in all our history has brought more menace to our political institutions It might have been better to run the risk of extravagance by State legislatures and municipal Councils Freed from constitutional fetters, sobered by responsibility, they might have met the situation better than it was met by centering the tremendous task in Washington

#### FORM AND LIMIT

In the matter of the form that should be taken by a budget bill, or indeed of any appropriation bill, the chief difference of opinion is over the question of segregation. Should the money be allotted to a large number of purposes carefully itemized,

or should it be given for purposes combined under single headings, with a lump sum to each? Here legislative and administrative considerations are so intermixed that precise answer based on principle is impossible. Only experience can determine, and so far its lessons are clear in only a few fields. For example, we have come to general agreement that it is not wise to specify in statutes what particular roads shall be constructed with highway money. It is better to let the Highway Commission apportion a lump sum. River and harbor work ought to be treated the same way, even if all lawmakers do not yet think so. Log-rolling for harbor improvements was the bane of the State Legislature in my time there. Men were elected from the shore towns for the sole purpose of getting a breakwater, or having a channel dredged, or securing some like improvement. From the day they took their seats, these men would bend their energies to the sole task of getting their bills passed, swapping their votes right and left to that end.

Their chief danger was the Committee on Ways and Means (our appropriating committee), where their measures had to go after favorable report from the generous Committee on Harbors and Public Lands. So they sought the first chance to break down the influence of the Committee on Ways and Means. Various bad results followed. To stop all this, it was suggested that a lump sum for harbor improvements should be put in the hands of the Harbor and Land Commissioners, to be distributed where in their expert judgment it might seem to be most needed. Governor Draper took up the idea and in 1909 persuaded the Legislature to do this with an appropriation of \$100,000 a year. At first the policy was respected and in 1910 only eleven petitions for special appropriations were ventured. Virtue, however, was but short-lived. In 1914 the number had risen to forty-six. Better fortune had met the same policy in the matter of appropriations for State Highways. During a score of years the public made little attempt to get outside the annual appropriation of \$500,000 expended where the Commission thought best. Then the Legislature broke down the system and nobody now hesitates to come in with a special bill. Nevertheless the State has had experience enough with lump sum appropriation to show it to be far the better policy.

The idea has made slow headway at Washington. President Taft's Commission on Economy and Efficiency suggested that

appropriations be made in the lump sum to a much greater extent. Senator Burton succeeded in getting the plan applied once to river and harbor expenditures, but it was looked on as a temporary expedient. However, after the Great War, when it was universally recognized that the strictest economy was desirable, the 66th Congress (1919-21) made its river and harbor appropriations in the lump sum form, encouraging the hope that this might become an established practice. If the break can last until the House is controlled by new-comers unfamiliar with the old custom, perhaps the gain can be held. One difficulty presents itself to the man who will undeceive himself and by looking the facts in the face will recognize that the situation has been grievously misunderstood. Reiteration of calumny has convinced the public that through many years the River and Harbor Bill has been a national scandal for which self-seeking Congressmen have been wholly responsible. When it is discovered that practically all of these expenditures have been recommended by the army engineers after what has been presumed to be thorough and expert investigation, doubt rises as to whether they could be trusted to compute an aggregate estimate of what ought to be spent in any one year. Nevertheless it is my own judgment that on the whole less harm will be done by leaving allotment to the experts.

This view would apply also to the appropriations for public buildings. That field furnishes even more occasion for trying to get rid of "the pork-barrel." Take post offices. The legitimate tests are population served, volume of business, and cost of maintenance (including interest on investment) as compared with rent for adequate quarters privately owned. Congress could easily stipulate application of these tests by the Post Office Department and limit its annual appropriation to the total of the construction that would meet them. From mistaken views of self-interest members now refuse to rid themselves of their needless cares and burdens in the matter. The public welfare continues to suffer.

Whether the army and navy appropriation bills specify too much is a harder question, but with them as with all the other appropriation bills that Congress passes, while recognizing there are strong arguments the other way, chiefly based on the extravagant tendencies of administrative agencies, nevertheless by reason of the greater efficiency to be secured, my own

judgment is that there would be net gain from less specification.

Lump-sum appropriation reached high-watermark in the period following the taking of office by President Franklin D. Roosevelt. On the ground of imperative needs brought by the great depression, Congress to unprecedented degree waived its prerogatives, some would say abandoned its duties. The height of one-man power, as measured by money, was reached when Public Resolution No. 11 of the 74th Congress, approved April 8, 1935, entrusted to the President the expenditure of nearly five billion dollars. Apart from a few details not affecting the magnitude of the trust, he was restricted only by the specification of eight groups of purposes, with allotments thereto ranging from \$100,000,000 to \$900,000,000.

The hugeness of the amounts staggers the imagination. The human mind cannot grasp them. Yet the principle involved was the same as if thousands instead of billions were at stake. Considering only that principle as applied to an exceptionally wide range of diversified public expenditure, it has to be admitted that such a body as Congress could not intelligently do the work of itemized allotment. At the same time it is far from clear that a heterogeneous group of administrators, with conflicting interests and competing judgments, could do it any better. The truth of the matter seems to me to be that we have not yet solved the problem of getting well-proportioned outlay, well-balanced administration.

Some day we may solve that problem by devising a new governmental body that will attend to details. The further growth of business may drive our Congress and our Legislatures to recognize what will have become imperative need for getting rid of the petty things and confining themselves to the big things, the policies of government.

In ordinary times segregation concerns mostly the smaller questions. From the legislative point of view, the less of it the better, if for no other reason than because of the precious time they take that might better be given to principles and policies. The conditions of a Congress or Legislature unfit it for splitting hairs. The maxim says *De minimis non curat lex* — The law does not notice trifling matters. Lawmakers ought to be compelled to take the same ground. Until we are wise enough to accomplish that, each lawmaking body will have to decide for itself how far it may entrust discretion to administrators, having

in mind the prevailing standards of political conduct, private morality, public honor, and administrative capacity

It is not clear whether or not any restriction on Legislatures is involved in the controversy over the respective merits of limited and continuing appropriations, but as anyhow legislative practice is concerned, it should get a word. When the early Parliaments were bargaining with the Kings, of course it was for the interest of the Commons to limit their grants, so that they might have frequent chance to revise their relations with the monarch and keep him under some sort of control. Out of this grew in time the annual sessions of Parliament. It was found, however, that too strict an application of the theory of short-time grants brought certain inconveniences and notable among them the instability of national finance in respect to debt. Palpably if a lender had to rely on an annual appropriation to pay the interest on the loan, a costly element of uncertainty was introduced. Furthermore the early system of designating certain revenues from which certain obligations should be met, proved unsatisfactory. This brought about the creation of the Consolidated Fund by Pitt, in 1787. Into this all revenues were to be paid and out of it all expenditures defrayed. By far the larger part of the revenues reach this Fund, and about one third of the expenditures in ordinary times leave it, as a result of permanent acts. Englishmen think themselves safe if a considerable part of the outlay is exposed to annual scrutiny, without requiring this for interest payments and other charges which have come to be recognized as fairly permanent and stable.

Colonial conditions tended to implant in our habits the custom of temporary appropriation. Fear of executive power, induced by the quarrels with the provincial Governors, strengthened the belief that anything else would be dangerous. However, it does not seem to have been looked on as a matter requiring attention in our Constitutions until the extravagances of the internal-improvement epoch had taught the need of greater safeguard for State finance. Then in 1845 Louisiana said no appropriation of money should be made for more than two years. In 1846 Texas copied this and New York reached the same result with other phraseology. Illinois in 1848 preferred to say that each General Assembly should "provide for all the appropriations necessary for the ordinary and contingent expenses of

the government until the adjournment of the next regular session." The Constitutions of ten other States now prevent continuing appropriations. In about a third of the States custom secures the same result. The others show much variance in the ratio between the appropriations made for a limited period and the expenditures made in conformity with general statutes. In the case of about one fifth it may be said that expenditure by permanent statutes is practically the custom. Also there are wide variances in the habit as to raising revenue, though with a wider tendency to use permanent statutes.

The national receipts are secured through permanent laws, and some of the expenditures are provided for in the same way, such as the debt payments, the expenses of collecting customs duties, and the salaries of judicial officers, but for the greater part of the outlay it is necessary that each Congress appropriate annually, or in case there is failure at the end of a term, that the next Congress take up the subject forthwith. Where a permanent statute directs outlay, as for example in the case of a salary, the courts have held that the person entitled to it may get it by writ of mandamus if there has been no special appropriation.

In favor of appropriation for limited periods it is urged that it is desirable thus to call frequently to the attention of Legislature and public the various expenditures, for the sake of more careful scrutiny and of readier control. Continuing appropriations that do not require any given part of the outlay to be confined to any specified time, make it hard to figure just what is the financial condition of the State at any one moment, and therefore are obnoxious to the accountants.

Much more severe is the adverse criticism of limited appropriations, and the experience of some States would seem amply to warrant the criticism. Charles McCarthy attributed to that system inefficiency, corruption, and log-rolling. He rejoiced that it had been excluded from his own State of Wisconsin in spite of constant pressure for its introduction. "Such a plan," he said, "means minority control of all institutions and departments; it means that every institution or department dies every two years, for unless the appropriation is forthcoming the institution or department goes out of existence, it means that twenty members of a Senate — if twenty is a quorum — may say to the entire Legislature. 'It takes an affirmative action to



pass this money, and we can block it. If the institution or department wants this money, it will have to accept our terms.' That is, the minority dictates the terms. This little joker has not been realized by our wise economists and accountants who have been called upon to help Legislatures to better their financial procedure, but it has destroyed the spirit of institutions, it has debauched commissions and departments, and resulted in stagnation in many States. In some States where things are peacefully sleeping, we hear nothing of its influence, but let an institution or commission become really active and note what will happen. The writer has evidence in his possession from many States of its power."<sup>1</sup>

Doubtless Mr. McCarthy had in mind the unfortunate experiences of some of the Western State Universities. The ease with which the politicians can get at them under the limited-appropriation system has been baneful. Furthermore these institutions have with much reason complained bitterly of the harm wrought through inability to plan with confidence for development through a series of years. Where costly buildings or elaborate equipment are involved, it can be readily seen that progress is handicapped if there can be no reasonable degree of certainty that a policy once begun will be carried through and that the money will be forthcoming to accomplish results which have been agreed upon as desirable. The constant lobbying that the system entails is particularly disagreeable to educators and is rarely to the taste of the trustees of any of our public institutions. Occasion for it is surely regrettable.

It is averred that the limited-appropriation system is in some measure responsible for strengthening the control of "the organization" in those Legislatures that are boss-ridden. In California, for instance, we are told that although the various State institutions are local in their work, the Senators and Assemblymen from the counties in which they are situated are, by custom, charged with the responsibility of securing the appropriations necessary for their support. "Too often the ability of the Assemblyman or Senator is measured, not by his real work in the Legislature, but by the size of the appropriations which he manages to secure for his district. Under the system by which the machine organizes the Legislature, it is in a position to defeat or materially reduce practically any appropria-

<sup>1</sup> C. McCarthy, *The Wisconsin Idea*, 203

tion bill. The member of the Legislature who would oppose the machine thus finds himself between the constituents at home, who demand that he secure generous appropriations for his district, and the machine, which he understands very well requires support of its policies, as one of the prices of the constituent-demanded appropriations. Thus those who would have opposed the machine in the organization of the Assembly realized that failure would probably mean a hammering of their appropriation bills, which would result in their political undoing at home."<sup>1</sup>

Whether or not this is overdrawn, it is easy to see the danger. However, that it is not a necessary result of appropriating for limited periods, is shown by the fact that it is not an invariable result. There are States using the system that show nothing of the sort. A fair conclusion is that though it may serve to strengthen a "machine," it does not produce the machine.

#### ENCROACHMENTS

In his Farewell Address, George Washington said. "It is important likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department, to encroach upon one another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism."

That spirit of encroachment is ever at work. A notable example of it came with the adoption of the Federal Budget system. The executive branch began at once to pass judgment on proposed legislation, in effect to throw its weight into the scale in matter of policy, to usurp thus in some measure the prerogatives of the legislative branch. Submitting without protest, indeed to some degree encouraging, the House of Representatives has indirectly and unavowedly given to the executive branch a material part of its power. This came about through the fact that necessarily much the greater part of the time of each session must be given to the appropriation bills and a comparatively few other bills of major importance. Most of the rest of the bills reported by the committees get small chance for action regularly except on the two days of the month de-

<sup>1</sup> Hichborn, *Story of the Calif. Leg. of 1909*, pp. 30-31.

voted to what is known as the Consent Calendar. No sooner had the budget system gone into effect, than members began objecting if the committee report on a bill involving payment of money did not show that it had been reported on by the Director of the Budget and that it was in accord with "the financial programme of the President." Many committees suffered loss of their bills in this way and the practice became so obnoxious that March 10, 1928, a serious debate was devoted to its dangers.<sup>1</sup>

When the budget bill was under consideration in the House, October 21, 1919,<sup>2</sup> Representative Martin Madden had said "I want to call attention to the fact that the bureau of the budget is simply a clerical force placed at the disposal of the President of the United States to furnish him with information as to how he shall make up the estimates for expenditures for the conduct of the government for any given year." Representative Willis C. Hawley averred. "I would not tie the hands of members of the House or impair their opportunities or diminish their chance of rendering public service to the country in the initiation of great public policies ... We have not changed the responsibilities of the House in this bill."<sup>3</sup>

In the debate of 1928 Mr. Madden dwelt chiefly on the fact that all along the line everybody had acted technically within his rights, but he did not meet the contention that in practice the Director of the Budget had to important degree prevented legislation and thus in the negative way had become a lawmaker, with the serious result of important intermingling of legislative and executive powers. Nothing definite came from the debate, but since then there seems to have been in the office of the Director less passing of judgment on policies, and in the House less of demand for his approval.

The danger was admirably set forth in a letter written to me January 28, 1929, by James W. Good, who had been chairman of the committee framing the budget bill, and who was afterward Secretary of War for a time. Said Mr. Good: "I regard as most questionable the practice of submitting bills pending in either the Senate or the House to the Director of the Budget and leaving the fate of such bills in that official's hands. Certainly no such programme was in the minds of the members

<sup>1</sup> *Cong. Record*, vol. 69, pt. 1, p. 4480

<sup>2</sup> *Cong. Record*, vol. 55, p. 7294

<sup>3</sup> *Ibid.*, p. 7138.

of the House committee that considered budgetary legislation and if that plan is followed, sooner or later it will destroy the budget system, for it kills needed legislation before there is an opportunity to discuss it on the floor of the Senate or the House. The framers of the Constitution provided a method of veto of bills after they had passed Congress. It was never intended that the budget system should provide a method of veto, even before such bills could be considered by either the Senate or the House."

The wise course would be for the Director of the Budget to have communication or contact only with the Committee on Appropriations. The legislating committees, which do nothing but recommend an authorization, should be free to advise that a specified thing be done. House, Senate, and President may approve. The appropriating committee should then advise as to when and to what extent it should be done. At that point, and not before, there may well be inquiry as to the bearing of "the financial programme of the President."

President Wilson vetoed an appropriation bill May 13, 1920, because it contained a proviso that certain documents should not be printed by an executive branch or officer except with the approval of the Joint Committee on Printing. He declared it "an invasion of the province of the Executive and calculated to result in unwarranted interferences in the processes of good government, producing confusion, irritation, and distrust." Violations of the principle in previous statutes were cited to show a growing tendency he was sure not fully realized by the Congress itself and certainly not by the people of the country.

On the same ground President Hoover, January 24, 1933, vetoed an appropriation bill that gave a Congressional committee executive power. The Joint Committee on Internal Revenue Taxation was to pass judgment on any refund of taxes in excess of \$20,000. His brief message was accompanied by adequate discussion of the subject in an opinion by Attorney General Mitchell.<sup>1</sup> The opinion recognized that the matter of making refunds might involve legislative, executive, or judicial functions, but if in the present case it were an executive or judicial function, Congress could not exercise it, and if it were a legislative function, it could not be exercised by a committee. If the practice were permissible, Congress could subvert the

<sup>1</sup> H. of R. Doc. 529, 72d Congress, 2d Session

Constitution by making conditions that the executive department abrogate its functions

Here and there, now and then, lawmakers seek to increase their burdens, perhaps it would be better to say their opportunities, by encroaching on the executive branch. New York has given an interesting and instructive example of this. In 1920 a statute appropriating \$500,000 for the expense of the State Comptroller in collecting an income tax provided that no new positions should be created and no salaries fixed without the unanimous approval of the Governor, the Chairman of the Finance Committee of the Senate, and the Chairman of the Ways and Means Committee of the Assembly. The practice thus begun, of giving the legislative branch control over executive functions, grew until the question of its constitutionality reached the Court of Appeals, where, in 1929, it was ended with two opinions reaching the same conclusion. These opinions treated comprehensively the matter of the separation of powers and students of the subject will do well to read *People v. Tremaine*, 252 N. Y. 27 (1929), not only for the light ably thrown on this phase of our governmental system, but also by reason of its discussion of the power of a legislative body to delegate its responsibilities to some of its own members, the bearing of constitutional provisions forbidding legislators to hold "civil appointments," and the right to alter budget bills.

It was concluded that "the power to itemize legislative appropriations is a legislative power, which it may exercise if it sees fit as long as the matter is in its hands." Except as to legislative and judicial appropriations, the administrative or executive power spends the money appropriated. "Members of the legislature may not be appointed to spend the money." All the judges but one held that the naming of a legislator to perform the administrative work in question was a "civil appointment." The Governor had the right to veto a section added to the supplementary budget bill that was "a piece of independent directory legislation."

Much the same question reached our Supreme Court from the Philippine Islands. An act had vested power to vote the stock of two corporations largely owned by the Philippine government, in one case in a committee, in the other a Board of Control, each made up of the Governor General, the President of the Senate, and the Speaker of the House. The Court

held that while some of our Constitutions do not expressly provide for separation of the three powers, it is implicit in them, and Justice Sutherland, speaking for the majority, went on to say "The legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment [an executive function] by indirection."<sup>1</sup> As to the Smithsonian Institution, some of the Regents of which are named by Senate and House from their membership, and two or three other corporations of the same character, it was held that in view of their limited number and peculiar character, they could not justify legislation like that in issue. Justice Holmes (Justice Brandeis agreeing with him) in a minority opinion attached more importance to instances of that sort. He averred that to question the Smithsonian Institution would be to lay hands on the Ark of the Covenant. In his judgment the Philippine corporation was plainly no part of the executive functions of the Government, but rather fell into the indiscriminate residue of matters within legislative control.

<sup>1</sup> *Springer v. Philippine Islands*, 277 U.S. 189 (1928).

## CHAPTER XVI

### ADMINISTRATIVE LEGISLATION

IF THOSE are right who say that by far the larger part of the unpopularity of modern legislatures is due to the evils arising from the confusion of legislative and administrative functions, it becomes of grave importance to examine this feature of representative government.<sup>1</sup>

At the start definition and delimitation give trouble. "Legislative" covers everything from treaties, the supreme law of the land, down to insignificant rules and regulations. As to "administrative" and "executive" the dictionaries give no help, treating them as virtually synonymous. Once, the "Century," quotes the definition of Alexander Hamilton as given in Number 72 of "The Federalist," at a time when the triple classification of Montesquieu was rarely questioned as insufficient "The administration of government in its largest sense," Hamilton said, "comprehends all the operations of the body politic, whether legislative, executive, or judiciary, but in its most usual and perhaps its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the directions of the operations of war — these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government."

Could Hamilton have been able to look forward a century and a quarter, would he have set it forth more accurately? Perhaps he would have rearranged the items, somewhat subordinating foreign negotiations and matters of war, in his day naturally uppermost because of recent history and present problems, but fortunately destined in the years following to have only occasional and transient supremacy. Perhaps he would have omitted the preparatory plans of finance, at any rate until in our time the demand for budgets gained strength, and even now it is not

<sup>1</sup> *E.g.* J. Q. Dealey, *The State and Government*, 243

clear that anything preliminary is administrative. Probably he would have put at the front "the application and disbursement of the public moneys in conformity to the general appropriations of the legislature" That has come to be the chief part of administration.

Its magnitude now has led to attempt at scientific segregation and definition. W. F. Willoughby has led in this, with helpful studies and judicious treatment "The executive function," he says, "is the function of representing the government as a whole, and of seeing that all its laws are complied with by the several parts. The administrative function is the function of actually administering the law as declared by the legislative and interpreted by the judicial branches of the government."<sup>1</sup> That reads well and is accurate as far as it goes, but try to apply it to the daily work, say, of a member of the President's Cabinet, and you will quickly find yourself puzzled. Go down the line to such an agency as the Interstate Commerce Commission or the Federal Trade Commission and ask yourself whether its respective duties are legislative, administrative, executive, or judicial, and whether putting "quasi" in front of these words will clarify the description.

Professor Willoughby further says that distinction is usually made by declaring the executive function to be essentially political in character, that is, one having to do with the determination of general policies, and involving the exercise of judgment in its use; and the administrative function to be one concerned with the putting into effect of policies as determined by other organs. This distinction had helped so much in forming my own conclusions, differing in some respects from those reached by Professor Willoughby, that to elaborate it somewhat may be worth while.

A policy-forming law is one that expresses a purpose. For example, "The sale of liquor is hereby prohibited," is a policy-forming law. To carry out the prohibition requires the machinery of police and courts. Another kind of law must provide this machinery and prescribe its operation. That we call administrative law. Or take such a matter as old-age pensions. If a State wishes to provide them, first it must say so, thus declaring a policy. Then it must decide whether they shall be contributory

<sup>1</sup> *The Government of Modern States*, 232 *Principles of Legislative Organization and Administration*, 9



or non-contributory That is partly a question of policy, partly a question of administration, with policy predominating. Next must be determined the size of pensions and contributions. Here the administrative element becomes the more important With deciding the thousand details of the system, administration approaches full sway, and in the application of the system it becomes supreme.

Professor Willoughby would meet this apparent confusion of functions by tracing them all to one source, that of the law-making power of the legislative branch. He holds that when the executive exercises administrative power, "his authority so to act is derived, not from any constitutional provision, but by a grant of power from the legislature"<sup>1</sup> Upon this postulate, that the legislative branch is the source of all administrative authority, he builds the argument that unless empowered by some constitutional provision, the executive acts as an agent of the legislature and subject to its direction and control

For this view there is, indeed, judicial warrant. In a circuit court case in 1837, while the Court recognized that by the Constitution the President is to "take care that the laws be faithfully executed," this did not authorize him to tell the Postmaster-General how he should discharge his duties. "In that respect, the Postmaster-General must judge for himself, and upon his own responsibility, not to the President, but to the United States, whose officer he is."<sup>2</sup>

This doctrine was supposed to be confirmed by the Supreme Court in the following year "There are certain political duties," said the Court, "imposed upon many officers in the executive department the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution, and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not the direction of the President"<sup>3</sup>

Doubtless the meaning is that Congress may impose executive duties and responsibilities that are to be beyond the direction and control of the Chief Executive. It is not easy to reconcile

<sup>1</sup> *Principles of Legislative Organization and Administration*, 116.

<sup>2</sup> *U S v Kendall*, 5 Cranch C C , 163, 272 (1837).

<sup>3</sup> *Kendall v U S*, 12 Peters, 524 (1838)

this with the words of the Constitution: "The Executive power shall be vested in a president of the United States of America."

There is general admission of the right of our Chief Executives, whether of nation or States, to exercise powers that can be reasonably inferred from those explicitly granted. The important problem is, what shall be reasonably inferred from the word "executive"; and the difficulty comes from the fact that when this word was first used in our Constitutions, it was supposed to be synonymous with or at least to include "administrative." There is ground for argument that where Constitution or statute does not prevent, the Chief Executive may direct and control every official in the executive department. If that be the case, it would seem that he can also do the subordinate law-making, issue the ordinances, rules, and regulations, necessary to carry out policies the legislative branch has enacted. Then the vital question is that of drawing the line between primary and secondary legislation.

That phase of administration which concerns management and discipline would not concern us here were it not that there are those who stoutly maintain it to be within the province of the legislative branch. Professor Willoughby, for instance, repeatedly refers to "direction, supervision, and control" as legislative functions. To his theory that this necessarily follows from the fact that the legislature is the source of administrative authority, I take exception. The source of power need not necessarily direct, supervise, or control its use. Through statutes the legislature may direct, through appropriations it may in some measure control, but supervision seems to me to be primarily an executive rather than a legislative function. In other affairs of life Presidents and General Managers and Superintendents do that work, not Boards of Directors. We meant our political executives to execute, to manage. Theirs should be the duty, the responsibility.

If President Franklin D. Roosevelt was right when in June of 1934 he refused to sign a bill to discontinue administrative furloughs in the postal service, even custom may prevent Congress from interfering with administration. Said Mr. Roosevelt: "Finally, it appears to be an unnecessary limitation on the administrative authority customarily vested in the President." Custom may grow and spread. Perhaps in time we shall find our Chief Executives really administering in full.

Observe that Mr. Roosevelt's opinion may seem to have run counter to that of the courts as set forth in *U S v Kendall* and *Kendall v U S.*, cited above, to the effect that the affairs of the Post Office Department are no concern of the President and that the Postmaster General is to be controlled only by statute law. It is hard at first blush to see how the President may appoint but not direct his appointee. The two things would seem to be correlative. However, inasmuch as the President by use of the veto shares in lawmaking, even though it be negatively, he has of course the right therein to use judgment as to expediency.

In passing it may be noticed that the new Philippine Constitution, approved by President Roosevelt, March 23, 1935, says: "The President shall have control of all the executive departments, bureaus, or offices, exercise general supervision over all local governments as may be provided by law, and take care that the laws be faithfully executed"<sup>1</sup>

#### IN THE STATES

All of the writers of our early State Constitutions were content to accept administration as so "peculiarly within the province of the executive department," to use Hamilton's phrase, that no separate treatment of it was necessary. Not until the Wisconsin Constitution of 1848 was it formally recognized, and then the recognition was very inadequate, for the four brief sections of the Article headed "Administrative" concerned only the duties of familiar State and county officials. Indiana, revising its Constitution in 1851, copied the idea of a separate Article, with provisions of the same sort, and consistently changed its statement of the distribution of powers to read "The powers of the Government are divided into three separate departments: the Legislative, the Executive (including the Administrative), and the Judicial," etc. Oregon in 1857 imitated Indiana in both particulars. Florida in 1868 also gave a separate Article to the subject, heading it — ADMINISTRATIVE DEPARTMENT. This began "Section 1. There shall be a cabinet of administrative officers, consisting of a secretary of state, attorney-general, comptroller, treasurer, surveyor-general, and superintendent of public instruction, adjutant-general, and commissioner of immigration, who shall assist the governor in the performance of his duties." The only joint function specified for this body was

<sup>1</sup> *Congressional Record*, 74th Congress, 1st session, Feb. 25, 1935, p. 2624

that of a board of commissioners of State institutions. It was to be appointed by the Governor. When amendment in 1870 decided that its members should be elected by the people, its possibilities must have been destroyed, and there is no occasion for surprise that recognition of a cabinet is not found in the Constitution of 1885.

Elsewhere the Constitutions still adhere to the tripartite theory of Montesquieu and leave no room for any fourth department. The attitude is that of the Ohio court in *Harmon v State*, 66 Ohio St 249 (1902). "The Constitution does not recognize such a power as administrative power. The Constitution provides only for legislative, executive, and judicial powers, and what is denominated in some other States as administrative power falls in this State within one of the three great powers recognized by our Constitution, legislative, executive, and judicial."

Herein those who of late have written or re-written American Constitutions, have failed to take into account the wonderful, the amazing transformation in government wrought within the last hundred years. From the fall of Rome up to a time not earlier than that of the childhood of many a man yet alive, none but dreamers conceived that government should by manifold activities advance the happiness of mankind. For fourteen centuries and more in only one direction had co-operative effort for the common welfare of a nation been conspicuously practised, and that was in the direction of war. Therein government had its birth. Men organized for aggression or defense. If you tell me that also for many ages justice was a concern of government, I retort that justice is nothing but the treatment of individual offense and defense, the war of individuals. All other governmental interests were incidental and subservient to those of international or intranational conflict.

I speak of the organization of States and Nations, their purpose and their functions. Within and beneath them were, it is true, many co-operative activities for objects of peace rather than those of war. Men were learning to work together in towns, cities, counties, colonies. Suddenly, with startling speed, the idea jumped from its narrow bounds and took possession of all the civilized world. To-day there is no State, no Nation, that fails to put promoting the happiness, the comfort, the prosperity, of its people ahead of all its other duties. Not only is that

first — also it exceeds in volume all other concerns put together.

Few men realize this. The fact has been accepted reluctantly and partly if at all by most men now past forty years of age, men who in youth were by tradition and habit blinded to what was going on about them, the men who wrought this revolution with their own hands and knew not what they were doing. Even the younger generation has not fully grasped the change, for they are still fed on the histories and political writings of an earlier epoch. Yet he who will may find the pregnant proof in any current report of city, State, or national treasury. Let him contrast it with a like record of a century ago. Let him note the huge increase in the volume of joint expenditure for common welfare. Let him note the number and variety of the agencies through which this expenditure is now made. Let him compare the roster of public servants to-day with that, say, of Boston when it was made a city, in 1822, or the State of New York before De Witt Clinton persuaded it to construct the Erie Canal, or the United States when internal improvements first became a political issue. The figures should waken the thoughtful to the fact that the administrative department of government, the business of government, has become, if not its supreme, at any rate its overshadowing function.

The experience of a single State will sufficiently illustrate what has taken place. Massachusetts will serve for this purpose as well as any other, for though great diversities are to be found, in general the States have followed the same line of progress. In Massachusetts it began with the establishment of the State Board of Education in 1837 as a result of the exertions of Horace Mann, generally regarded as the founder of the public school system as it now exists, a development, however, of an institution coeval with Massachusetts itself. The Board of Education does not administer the school system. Its duties continue, as they were at the start, largely advisory. However, when the time arrived to establish vocational education, it was upon the Board rather than on the communities that the initial responsibility was placed.

In 1852 came the State Board of Agriculture, with even less routine work than that of the Board of Education. For half a century the public asked and received from it little more than an annual report crowded with miscellaneous information ex-

pected to help the farmer, and a system of gatherings where instructive addresses were delivered. Now other duties of more definite importance are gradually coming under its control, and with the growing problems of food production and conservation it is sure this Board will soon be seriously administrative.

Barring the relatively unimportant Cattle Commission established in 1860, the State Board of Charities came next, in 1863. Its field has grown until now it has charge of large expenditures. The Savings Bank Commission and that on Inland Fisheries in 1866, with the Bureau of Statistics of Labor in 1869, have not spent a relatively large part of the public income, nor for that matter has the Railroad Commission, created in 1869, and long supported at the expense of the railroads, but the Railroad Commission has really been the most important of all, as the model for every other Railroad Commission in the land, and indeed for the Inter-State Commerce Commission, the most powerful administrative agency of the Federal government.

To enumerate all the succeeding steps would be fruitless. It is enough to say that when the Massachusetts Constitutional Convention of 1917-19 faced the situation, it found in existence about a hundred Departments, Boards, Bureaus, and Commissions. This had not come to pass without remonstrance. Massachusetts had long been a Republican State with a habit of electing Democratic Governors now and then. Those gentlemen had in their campaigns condemned government by commissions, but promises to reduce the number thereof, made indeed by candidates of both parties, had never been kept to any degree worth notice, on the contrary Governors who had made such promises usually signed two or three bills creating still more commissions. The truth of the matter is that the denunciation of commissions had been largely for political effect, as it still is everywhere else. Their number has kept on increasing by reason of needs that have seemed imperative to the representatives chosen by the people to attend to their affairs.

The Massachusetts Convention advised and the voters approved consolidation into not more than twenty departments, but of course this did not importantly lessen the variety or amount of work to be done. That has kept on growing. Its volume now may be inferred from the fact that in 1934 the Commonwealth did a cash business (debt and its service excluded) of nearly sixty million dollars.

Everywhere the establishment of administrative agencies has been largely experimental, with the losses as well as the gains that naturally attach to experiments. Mistakes have been inevitable. For instance, popular election of administrative agents is generally admitted to have proved a mistake. (Of course a Massachusetts man runs the risk of being thought supercilious if he points out that his own State has never committed this blunder, and if he advises other States to get rid of its damage as fast as they can.) Even if there have been mistakes, the system as a whole has justified itself, and at any rate, it has come to stay. Its form may change, but its essence is sure to survive, for nothing short of revolution will stop the development of co-operative activity on which we have embarked, and this activity must have organized agencies for its conduct.

The duties entrusted to these agencies have now gone far beyond the essentially executive characteristics Hamilton particularly found in the function of administration. Indeed, the modern administrative agency is usually executive and legislative and judicial. As Herbert Croly says: "It legislates, but without being or dispensing with a legislature. It administers, but without being or dispensing with an executive. It adjudicates, but without any power of attaching final construction to the law. It is simply a convenient means of consolidating the divided activities of the government for certain practical social purposes."<sup>1</sup>

Here, of course, it is the legislative aspect that interests. Does the lawmaking apparatus of an administrative agency offer acceptable relief to the lawmaking apparatus with which we have long been familiar? Should it be developed, or should it be checked?

#### NATURE OF STATUTES

In answering these questions, bear in mind that in the matter of statutes there are two factors to be taken into account — first, their number, and secondly, their nature. These factors are not independent, but react on each other. Yet they are distinct enough to confuse comparisons if not discriminated. Speaking broadly, statutes in the United States are many and their details are elaborate, in England and her dominions statutes are few, and their details are many; in the countries of

<sup>1</sup> *Progressive Democracy*, 364

Continental Europe statutes are few and their details are few. Whatever the combination, the source of difference is the same, viz the division of lawmaking between the legislature and administrative agencies, and it is this division that is the important thing to study.

In France, Lowell tells us,<sup>1</sup> statutes that do not concern the rights of a man against his neighbor, that do not, in other words, form a part of the Civil Code, are often couched in general terms, and enunciate a principle which the Executive is to carry out in detail. Sometimes the President of the Republic is expressly given power to make regulations, but even without any special authority he has a general power to make them for the purpose of completing the statutes, by virtue of his general duty to execute the laws. Such regulations in France are called acts of secondary legislation, and the ordinances of the President in which they are contained are termed *décrets*. The power to make them is not, however, confined to the chief of the State. For matters of inferior gravity the laws often confer a similar authority on the ministers, the prefects, and even the mayors, and in this case the edicts are termed *arrêtés*, to distinguish them from the more solemn ordinances of the President. The regulations cannot, of course, be contrary to law, or in excess of the authority of the official who issues them. If they are so and infringe private rights, a process to have them annulled may be instituted before the administrative courts, and in certain limited cases the ordinary courts also can refuse to apply them.

In Italy the power of the executive officials to make ordinances is even more extensively used than in France, and even before Mussolini there were complaints that it was sometimes carried so far as to render the provisions of a statute nugatory, although the Constitution expressly declared that "the King makes the decrees and regulations necessary for the execution of the laws, without suspending their observance or dispensing with them." The interpretation put on this provision was in fact so broad that the government was practically allowed to suspend the law subject to responsibility to Parliament, and even to make temporary laws which were to be submitted to Parliament later — a power that was used when a tariff bill was introduced, to prevent large importations before the tariff went into effect. The Parliament had, moreover, a habit of delegating legislative power to

<sup>1</sup> *Governments and Parties in Continental Europe*, I, 45.



the ministers in the most astonishing way. Lowell said that in the case of the criminal code, for example, the final text was never submitted to the Chambers at all, but after the subject had been sufficiently debated, the government was authorized to make a complete draft of the code, and then to enact it by royal decree, harmonizing it with itself and with other statutes, and taking into account the views expressed by the Chambers. The same was true of the electoral law of 1882, of later laws on local government and on the Council of State, and of many other enactments. It may be added that although the statute did not expressly provide for it, the ministers, prefects, syndics, and other officials were in the habit of making decrees on subjects of minor importance. The preference indeed for administrative regulations, which the government can change at any time, over rigid statutes is deeply implanted in the Latin races, and seems to be specially marked in Italy.<sup>1</sup>

Greece recognizes in her Constitution the doctrine that administrative detail is not a proper function of legislative assemblies, by saying that "the elaboration of projects of law and of decrees containing regulations" is one of the things that belong particularly to the Council of State. The Constitution of Poland provided that the President should have the right to issue executive ordinances, directions, orders, and prohibitions for the purpose of executing the statutes. Brazil, Argentina, and Chile provided likewise. Such power is given to the Emperor of Japan, and also, probably unique, is his constitutional power to issue ordinances "for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects," but no ordinance shall in any way alter any of the existing laws.

Turning to England, one is at first puzzled by the fact that while English writers deplore the prolixity of English laws, the volume containing the Acts of Parliament for a year is much smaller than that containing the measures enacted by many an American State in the same time. The explanation is found in the English volume containing Statutory Rules and Orders, put in force under the Statutory Order system. Parliament does in fact confine itself for the most part to consideration of general questions of policy, but both in the matters it handles directly and in those it handles by specifically or tacitly approving the

<sup>1</sup> *Governments and Parties in Continental Europe*, I, 165

laws framed by administrative departments, minuteness is the characteristic

This leads English critics to look with envy at the greater simplicity of Continental statutes. For example, A. V. Dicey says that the cumbersomeness and prolixity of English statute law is due in no small measure to futile endeavors of Parliament to work out the details of large legislative changes. "This evil has become so apparent that in modern times Acts of Parliament constantly contain provisions empowering the Privy Council, the judges, or some other body to make rules under the Act for the determination of details which cannot be settled by Parliament. But this is only an awkward mitigation of an acknowledged evil, and the substance no less than the form of the law would, it is probable, be a good deal improved if the executive government of England could, like that of France, by means of decrees, ordinances, or proclamations having the force of law, work out the detailed application of the general principles embodied in the Acts of the legislature. In this, as in some other instances, the restrictions wisely placed by our forefathers on the growth of royal power, are at the present day the cause of unnecessary restraints on the action of the executive government."<sup>1</sup>

Another competent observer, Sir Courtenay Ilbert, suggests reasons for this state of affairs. "Rightly or wrongly, Englishmen have an instinctive distrust of official discretion, an instinctive scepticism about bureaucratic wisdom, and they have carried this feeling with them into the United States and the British Colonies. They are ready enough, they are often embarrassingly eager, to confer new powers on the executive authority, central or local. But they like to determine for themselves how these powers are to be exercised. They like to see, in black and white, the rules by which their liberty of action is to be restrained, and to have an effective share in the making of those rules. And they insist on the meaning of those rules being determined, not by administrative authorities, nor by any special tribunal, but by the ordinary law courts of the country. This is the peculiarity which constitutes the most marked distinction between British and American legislation on the one hand, and Continental legislation on the other, and which makes the framework and arrangement of an English statute such an incomprehensible puzzle to the ordinary Continental student of laws."<sup>2</sup>

<sup>1</sup> *The Law of the Constitution*, 49

<sup>2</sup> *Legislative Methods and Forms*, 220.

On the Continent there are tribunals constituted especially for the interpretation and application of administrative law. In addition, the power of administrative departments to supply omissions in order to meet cases exceptional or unforeseen, is very broad. By reason of our lack of this Ernst Freund holds that our legislatures find it necessary to regulate the exercise of official powers in every particular, not because the minute regulation is ordinarily of the essence of the law, but because the officer has no one to look to for instruction and guidance beyond the letter of the statute. He points out that no discretion as to scope of action or choice of means can be allowed to subordinate officers without superior control. The hierarchical organization necessary for such control does not exist with us, but does exist in Europe, where we find executive powers independent of statute, discretionary powers of action and control vested in superior officers, and the concentration of the administrative powers of the government through the hierarchical organization of the executive department. From this he concludes that "the want of powers of direction and control in higher executive authorities is thus the real cause of the administrative over-activity of our legislatures, with its attendant evils" <sup>1</sup>

Lowell also gives the difference in the methods of interpreting statutes as one of the reasons why when an English or an American legislator drafts a statute he tries to cover all questions that can possibly arise. "He goes into details and describes minutely the operation of the act, in order that every conceivable case may be expressly and distinctly provided for. He does this because there is no one who has power to remedy defects that may subsequently appear. If the law is vague or obscure, it can receive an authoritative interpretation only from the courts by the slow process of litigation. If it is incomplete, it must remain so until amended by a subsequent enactment" <sup>2</sup>

Other writers have dwelt on difference in temperament as a cause for the minuteness of statutes enacted by English-speaking peoples. That may be a factor, but I incline rather to think the main cause historical. Such other nations as have reached anything like democracy, have jumped to it from autocracy, modifying old practices instead of developing new. They had lived long under despotic monarchs who were wont to announce

<sup>1</sup> "American Administrative Law," *Pol Sc Q*, ix, 3, Sept 1894.

<sup>2</sup> *Government and Parties in Continental Europe*, I, 44

their will in a few words, leaving details to be worked out by underlings. The assemblies that inherited the legislative power, took the form with the substance. In sharp contrast has been our gradual and lengthy development from humble beginnings. Early Parliaments in England and their progeny in America found nothing too trivial for their attention. Every step in the slow conquest of freedom strengthened men in the determination to make secure that which they won and hence the desire to limit and specify to minute degree. These and many other circumstances combined to produce the habit of directing in terms precise, elaborate, comprehensive, how authority delegated to the servants of the people should be exercised.

The baneful effect shows itself in every nook and cranny of the public service. Our officials must follow the exact paths prescribed by meticulous statutes. Discretion is tabooed. Judgment, self-reliance, inventiveness, are all undesirable qualities. Routine and red tape prevail.

The citizens themselves are saddled with useless duties. To illustrate, take the innumerable provisions nowadays for affidavits on returns and all sorts of other official documents. It is not probable that without these requirements there would be fraudulent signature once in a million times. Suppose it takes the affiant and the notary or justice between them twelve minutes, six apiece, to go through the form, this would be a low estimate for the time actually taken from other work in the case of the business man hunting up and bothering the notary or justice. That would make an aggregate of two hundred thousand hours, worth say an equal number of dollars, to guard the public against one fraud. The oath may be of some use in the case of an ignorant, impressionable witness on the stand, but the men who make official returns are neither ignorant nor impressionable. To them it is a perfunctory formality, irritating and wasteful. Its only value is in giving ground for prosecution in case of falsehood and in giving some assurance that the signature has been made by the man purporting to sign. Nine tenths of its purpose would be accomplished by a brief, omnibus statute, exposing to the penalties of perjury anybody forging a signature to an official return or knowingly making therein a false statement. The other tenth is not worth buying at the enormous price now demanded.

## VARIOUS VIEWS OF THE EVILS

The resultant evils attracted attention long ago. The celebrated philosopher and minister of France, M Turgot, wrote, in March, 1778, a letter to Dr Richard Price, containing many strictures upon the civil institutions of America, among them this: "I do not perceive that there has been sufficient care to reduce to the lowest possible number the kinds of business which the government of each State is to manage, or to separate the object of legislation from those of the general and those of the particular and local assemblies, which, by performing all the functions of detail in government, may free the general assemblies from engaging therein, and so to take from the members of these latter all means, and, perhaps, all desire to abuse an authority, which would only be occupied about objects general in their nature, and, therefore, unconnected with the little passions which agitate mankind" <sup>1</sup>

Not long afterward, one of our own great political philosophers, Thomas Jefferson, recognized the bad side of another phase of the situation as it had developed in the Congress of the Confederation "I think it very material," he wrote, "to separate in the hands of Congress the Executive and Legislative powers, as the Judiciary already are in some degree. This I hope will be done. The want of it has been the source of more evil than we have experienced from any other cause. Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress, he will observe the most important propositions hanging over from week to week, and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small objects; and should this division of power not be recommended by the Convention, it is my opinion Congress should make it itself by establishing an Executive committee" <sup>2</sup>

Undoubtedly the evils on which Jefferson dwelt had a potent

<sup>1</sup> *Works of John Adams*, iv, 280

<sup>2</sup> To Edward Carrington, Aug 4, 1787, *Writings of Jefferson*, P. L. Ford ed., iv, 424

influence in reconciling the people to the new Constitution, with its clearly defined executive department. The people continued, however, and to this day have continued, in the hands of the legislative department, both of nation and of States, all the control over administrative rules and regulations that they have not been compelled to let go. Whether or not this has been wise, assuredly it has reflected the popular instinct. To condemn such an instinct would be foolish and idle, a vain butting against a stone wall. The practical thing is to consider whether the people may usefully be persuaded to relax somewhat their tenacious grasp on the making of administrative law, not to substitute bureaucratic government in place of what they have, but to meet new conditions in a way not out of harmony with American political habit. Already we have an administrative department of government, unrecognized to be sure, unorganized and inchoate, yet in operation. Has not the time come to recognize it, to organize it, and to develop it?

The man who writes a treatise on political problems, lives ever in dread that his arguments may be lightly dismissed as academic, the product of *a priori* reasoning, redolent of the lamp, idealistic, visionary. This dread must be my warrant for turning so frequently to men of known experience and recognized authority in order that my contentions may be buttressed by their judgments. In the present instance, first let me cite James Bryce, in our day the wisest critic of political institutions, not only the keenest of observers, but also himself a working statesman, with practical experience in the House of Commons, afterward in high diplomatic service, and then in the House of Lords. Said he to the New York Bar Association in 1908 "Every modern legislature has more work thrown on it than it can find time to handle properly. In order, therefore, to secure sufficient time for the consideration of measures of general and permanent applicability, such matters as those relating to the details of administration or in the nature of executive orders should be left to be dealt with by the administrative department of government, under delegated powers, possibly with a right to disapprove reserved to the legislature."

In the front rank of American statesmen is Elihu Root. His judgment is: "When a legislative body has more business to do than it can properly consider, there is only one avenue of relief, and that is a continual increase of delegation of power. What

the Legislature could readily have done fifty years ago, the Legislature could not half do to-day, and it must delegate the other half to somebody else. That delegation of authority to subordinate officers or bodies that must exercise discretion formerly withheld from them, that must make rules and regulations upon matters formerly dealt with by statute, requires careful adjustment of governmental machinery, and we have not the machinery properly adjusted for that necessary process of government " <sup>1</sup>

The aggressive methods of Theodore Roosevelt did not conduce to the ready acceptance of his views in all quarters, yet even those who find their prejudices aroused by his dogmatisms, must admit his long and familiar acquaintance with the processes of lawmaking, both State and national, must recognize that his conclusions were grounded on personal experience in positions giving him the most exceptional opportunities for precise knowledge. Writing in "The Outlook" for August 6, 1910, on "A Remedy for Some Forms of Selfish Legislation," he dwelt particularly on the gains that would come to Congress if it would delegate its powers in the matter of three of the most considerable and bothersome classes of bills. "Congress," he said, "has now, and has long had, the power to rid its members of almost all the improper pressure brought to bear upon the individual by special interests — great and small, local and metropolitan — on such subjects as tariff legislation, river and harbor legislation, and pension legislation. Congress has not exercised this power, chiefly because of what I am bound to regard as a very shortsighted and unwise belief that it is beneath its dignity to delegate any of its functions. By passing a rule which would forbid the reception or passage of any pension bill save the pension legislation recommended by the Commissioner of Pensions (this of course to be rejected or amended as Congress saw fit, but not so amended as to include any special or private legislation), Congress would at once do away with the possibility of its members being subject to local pressure for improper private pension bills, and at the same time guarantee proper treatment for the veteran who really does deserve to have everything done for him that the country can afford. The veteran of this stamp has no stancher friend than the Commissioner of Pensions; whereas he is often the very man passed over when special bills are intro-

<sup>1</sup> *Proceedings of the Academy of Pol. Science*, v, 4 (1915)

duced, because the less deserving men are at least as apt as the others to have political influence. In the case of the tariff and the river and harbor legislation, what is needed in each case is ample provision for a commission of the highest possible grade, composed of men who thoroughly know the subject, and who possess every attribute required for the performance of the great and difficult task of framing in outline the legislation that the country, as distinguished from special interests, really needs. These men, from the very nature of the case, will be wholly free from the local pressure of special interests so keenly felt by every man who is dependent upon the vote of a particular district every two years for his continuance in public life.... Congress can with wisdom act in such matters of prime legislative importance as the tariff and river and harbor improvement, in the same way that the President acts in such matters of prime administrative importance as country life and conservation. It no more represents abdication of power on the part of Congress to appoint a first-class Tariff Commission than it represents abdication of power on the part of the President to appoint a first-class country life or Conservation Commission, or than it represents abdication of power on the part of voters to elect as Governor a man to whom they give all possible power to do his work well. In each case the body delegating the authority, so far from abdicating the power, has secured its wise use by intrusting it to a man or men especially equipped thus to use it well, and this man, or these men, can in turn be held to the most rigid accountability if it is not well used, in the exclusive service of the people as a whole."

With these views of experienced statesmen, let me couple opinions held by scholars of our time who have been led by the comparative study of government to like conclusions. Professor A. N. Holcombe says "Much of the work now attempted by the State Legislatures is work for which large representative bodies are not fitted. No inconsiderable portion of the output of legislation, so-called, consists of measures of an administrative or quasi-judicial character. Practically all private and local legislation is of this character. Fully half the time of the legislative committees is devoted to the consideration of such measures."<sup>1</sup>

S. Gale Lowrie finds "The theory which has controlled our policies has led us to expect too much of our Legislature. It has

<sup>1</sup> *State Government in the United States*, 236



been thought that it was the proper function of the Legislature to handle entirely, and independent of the other branches, all lawmaking functions. It has been necessary for that body to originate and formulate all plans and to control and balance the other activities as well. We have failed to recognize that the proper function of this branch is to determine questions of public policy and to act as an examining and controlling body over the other departments. The assumption of this position strengthens rather than weakens the legislative branch, inasmuch as the former theory necessitates detail work to such an extent that it is impossible for the Legislature to exercise its functions of supervision, examination, and control, which efficiency demands. In fact, our government has become so complex that it is no longer possible for the legislative branch to exercise the power of initiative and control which it formerly wielded."<sup>1</sup>

Add to these judgments the result of observation by two legislative experts who at close range have watched the actual conditions now prevailing. J. David Thompson, law librarian of Congress, said "Considerable time and energy could be saved through the delegation of much of the local and special legislation to administrative bodies acting under general law or, if Congress is still unwilling to relinquish control, such legislation might be taken care of completely by the appropriate Senate and House committees acting jointly, the passage of the bills through both Houses becoming purely a matter of form. At the present time it seems like straining at a gnat and swallowing a camel for Congress to insist that no bridge over a navigable river should be constructed without its direct consent when it has delegated its important rate-making power over interstate common carriers to a commission. It is particularly absurd that the time of the national Congress and its committees should be taken up with the discussion of a bill to extend or widen a highway in the city of Washington, or with a controversy as to whether the name of the street running from the White House should be 'Avenue of the Presidents' or '16th Street'. The exercise of exclusive legislation over the District of Columbia does not require Congress to make such minor municipal matters the subject of special enactment."<sup>2</sup>

And C. McCarthy, whose work in helping the Wisconsin

<sup>1</sup> *The Budget*, Wis. St. Bd. of Public Affairs, 1912, p. 88.

<sup>2</sup> *Proceedings of the Am. Pol. Science Assn.*, Dec. 1913-Jan. 1914, p. 174.

Legislature did so much toward making legislative reference libraries and bill-drafting departments inevitable everywhere, argued to like effect. "Is it any wonder," he asks, "that the business man is afraid of a legislative session when every bolt or screw in his machinery may be regulated by impractical laws, or matters of actuarial skill be determined in a few moments in a legislative committee, or the price of gas or some other thing equally scientific, regulated in an equally crude manner? Such a system cannot survive and it is merely a question of what system shall supplant it. That we will have to use a commission system of some sort is shown by the ordinary business arrangements of life. If a city owned a municipal baseball team, imagine the city holding a public election to elect a second-baseman or attempting to fix certain items of bats and balls! The only sensible way would be for the city to determine whether or not it would have a baseball team, to set the necessary limit upon expenditures for such a team, and to direct the council executing the will of the people, to secure a manager who would be the responsible director. Any common experience in life illustrates the same principle. We must have an administrator of any special line of endeavor and give to him the responsibility; commission government seems to be the best method to extend the legislative power scientifically, and the only way also of using judicial determination in great economic questions confronting the people. Dislike it as we may, we will have to employ it nevertheless — and that more and more frequently as economic life becomes more complex. Indications are that legislation for the future on great economic questions will be based upon a broad determination of policies by a legislative body, the carrying out of which will be entrusted to efficient servants and experts, responsible in every manner to the representatives of the people and the people in general." <sup>1</sup>

Let me conclude the testimony with a concrete criticism by a legislator who has written with acumen about the making of law in his own State, Pennsylvania. Samuel Bryan Scott says: "The basic reasons for the failure of the Legislature in the matter of charitable appropriations is the fact that it is trying to do work which is not legislative in nature, but administrative. To regulate the channels of expenditure is, of course, a proper function of the Legislature, but not minutely to apportion funds among a

<sup>1</sup> *The Wisconsin Idea*, 177, 178 (1912)

great number of institutions of the same class. The Legislature should determine nothing more than the amount of money it intends to apply in meeting its charitable obligations and the classes of beneficiaries who are to receive its bounty. Then it should indicate the basis upon which the money is to be distributed and should erect sufficient administrative machinery to supervise the work in which the State invests so heavily and to apportion the money on the basis laid down."<sup>1</sup>

#### EFFECT ON THE LEGISLATURE

The report of the Massachusetts Joint Special Committee on Legislative Procedure in 1915 showed the need of meeting the situation. The Committee found "year after year countless numbers of petitions before the Legislature asking for something plainly under the jurisdiction of some department, board, or commission, and within their power to grant." For instance, in the preceding five years there had been sent to the Committee on Mercantile Affairs forty-one petitions pertaining to telephone rates, to the Public Lighting Committee forty-seven pertaining to lighting rates, to the Committee on Railroads and Street Railways sixty-five pertaining to railroad rates and street railway fares — a total of 153 petitions concerning matters within the field of two Commissions. It was pointed out that many of these matters take considerable time in debate, as they are of that peculiar kind of legislation which furnishes the most opportunity for a certain type of legislator to make the most noise and curry the most favor with his constituents. Of course, when the principle of the thing is shown to and recognized by the members, most of the bills are defeated.

An interesting illustration of the time consumed was given by the matter of 80-cent gas for East Boston. The bill was reported upon adversely, was substituted after debate in the House, was debated at every debatable stage in both House and Senate, and in the end was vetoed by the Governor, after which the Gas and Electric Light Commission, on petition, reported in favor of the reduction.

The Committee also called attention to a class of matters that might easily, safely, and naturally be put within the control of existing Commissions. For instance, it showed that in the preceding five years there had been 182 petitions affecting in some

<sup>1</sup> *State Government in Pennsylvania*, ch 5, p 51

way the organization or powers of certain corporations other than business corporations, all of which might have been taken care of by the Commissioner of Corporations if certain powers had been delegated to him. They were measures entirely proper under the policy of the law and they affected no rights of the general public. Yet because the general law was not broad enough to cover them, they had to consume the time of the Legislature.

To take all administrative lawmaking away from the legislative branch would very greatly reduce the cost of legislation. Each one of the multitude of petty measures now encumbering the calendars entails expense. There must be printing, advertising, committee hearings, reports — all the routine processes that make a formidable aggregate of money and time. Freed from the trivialities, many a Legislature could cut the session in half, saving thereby a material part of the expense of officials, attendants, and even of members' salaries. It would be better, though, to put into the big problems the time that now is frittered away on minutiae. The really important thing is not to save money, but to get better work. As Professor Holcombe has wisely said, the object of legislative reform should be, not to prevent the legislatures from legislating badly, but to permit them to legislate well. "The existing Legislatures cannot be expected to rehabilitate themselves so long as they remain overburdened with non-legislative duties. The most promising method of restoring the Legislatures to their rightful place in public esteem is to relieve them of such classes of work as are not inseparable from the consideration and enactment of laws, and permit them to concentrate their powers upon the performance of their proper duties" <sup>1</sup>

This is even more applicable to Congress than to the Legislatures. Notoriously the House puts the greater part of its energies into the work of a Business Manager. The appropriation bills with their myriad of details get a scrutiny that no board of directors of one of our great corporations would ever think of giving to its processes. They should of course have the scrutiny, but not from the men whose business it is to determine principles and policies. If Congress would wake up to this it might achieve more of public interest and public confidence.

To the Chief Executive, also, as far as he has a part in legisla-

<sup>1</sup> *State Government in the United States*, 235

tion by reason of his duty to approve or veto, the elimination of administrative measures and special legislation would be a needed and great relief. This was pointed out by the Committee on Jurisprudence of the American Bar Association long ago. "It is a wasteful, perhaps almost an unrepblican form of government, to burden the Chief Executive with a minute supervision of all special legislation," said the Committee. "There are others who can do it as well, and whose time is of less value to the public" <sup>1</sup>

With such palpable advantages in sight, why do we delay giving the ordinance power to administrative agencies? It is in part because in none of our States are these agencies under such oversight and subordination and control as prevails, for example, in the sub-departments of a great industrial or transportation corporation. We are afraid of the thousand little Kings we are creating — semi-independent monarchs. Hesitating to come to the inevitable remedy, systematic organization of the executive department, we vainly hope to be loyal to tradition by binding our Gullivers with a myriad of threads. So we profusely elaborate instructions and limitations.

Charles Evans Hughes is one of our statesmen, practised as an executive, who has seen and commented on the folly of this. Speaking of the tendency to cripple administrative officers by laws that are too minute, he says "One of the chief causes for prolific legislation is the constant necessity for adjusting laws to the expanding need of municipalities that are living under special acts. Usually we meet the situation by altering a link in the chain, or by changing a clasp, which must be changed again in another year because of some other exigency. In the desire to maintain liberty and to protect themselves from the abuse of administrative discretion, Legislatures bind communities and officers with unnecessary bonds. . . There is no greater mistake than to withhold the power to do well in the fear of ill. There is no adequate power that cannot be abused. But we must endeavor to find a remedy against abuse short of making official and administrative power inadequate" <sup>2</sup>

Undoubtedly there are difficulties and dangers in the way. Some of them have alarmed Franklin Pierce. "So long," he fears, "as these commissions are allowed to exercise judicial and

<sup>1</sup> *Reports of Am Bar Association*, 17, 252 (1880)

<sup>2</sup> *Conditions of Progress in Democratic Government*, 44

legislative powers, without the right of review on the part of the regular courts, the citizen's rights are in danger. There is to-day no menace so great as administrative decisions. Our English ancestors three centuries ago escaped from the administrative courts of England. Let us beware of the danger of returning in our day to that kind of arbitrary government."<sup>1</sup>

It should be frankly admitted that what with offensive intent are called bureaucratic methods may be arbitrary, unreasonable, dogmatic, inconsiderate, impatient, or anything else unpleasant you want to call them. Has any man familiar with legislative bodies ever lacked occasion for applying any one of these adjectives to a legislative committee? Perhaps the committee-man can be more easily punished than the Commissioner for his shortcomings or his derelictions, but if that be so, how much should it weigh in the scale against the benefits of decision by experts rather than by greenhorns? It is the old question whether you would rather take your chance of justice at the hands of a mediocre judge who can be defeated for re-election, or at the hands of a judge of great ability appointed for life. We of Massachusetts prefer the unassailable judge, even if we cannot mete out retribution to him for his mistakes, his occasional bad temper, his peccadilloes. We may be wrong, but we prefer it. And for precisely the same reasons some of us would rather have our administrative rules and regulations made by administrative experts than by legislative committees chosen almost at random, with no especial fitness for their work, no fund of experience from which to draw, no impelling motive for study — in short no particular qualification whatever for the task.

It is possible to carry the logic too far. There is not always ground for such complaint as that implied by "The Outlook" when it said (Jan. 23, 1909, p. 143) "The Naval Committee of the Senate, of which Senator Hale is the chairman, has actually more to say about technical questions of the building and arming of our men-of-war than the President has through his Secretary of the Navy." It may very well have been the case that Senator Hale in the course of studying the subject through many years of service on the Naval Committee had come to know a good deal more about it than either the President or the Secretary of the Navy, men of brief experience and authority.

<sup>1</sup> *Federal Usurpation*, 374

However, as a rule the experts of the Navy Department are likely to be better informed than either a Senate Chairman or a President. Is not the best system of all that system which will entrust administration to experts, subject only to such control as is exercised by a Board of Directors in determining policies and by a capable corporation President who does not interfere with details unless important occasion arises?

By the way, "The Outlook" in the article quoted said it was never the intention of the founders of this Government that a committee of nearly five hundred civilians should decide the type of ships to be built, the speed at which those ships should run, the number of guns they should carry, the armament that should protect them, and all the other technical details of construction. I respectfully submit that this sort of thing was just what the founders of this Government did contemplate, or at any rate such was their practice. After this fashion the Continental Congress conducted the Revolutionary War. When Thomas Jefferson thought he could do such things better, his gunboats became the laughing stock of the land. What we are to recognize is that our fathers were wrong in thinking that administrative detail can be wisely handled by either a lawmaking body or a chief executive. The expert is the man for the task.

Analyzing the statutory output of the Pennsylvania Legislature of 1929, John Dickinson found a building code prescribing with minute particularity the composition of various kinds of building mortar as well as containing numerous mathematical formulae of an engineering nature.<sup>1</sup> Professor Dickinson pointed out that the inclusion of material of this kind in the statute book has several disadvantages. Perhaps the chief is that it freezes into the permanent rigidity of law detailed matters of technical practice that are constantly becoming obsolete with the improvement of the art, thus setting up a conflict between law on the one hand and the best technical practice on the other, which can be resolved only by constant resort to the difficult and clumsy process of amending the statute. In the second place regulations of this technical character cannot be competently framed by a legislative body consisting of laymen. "They must in the nature of things," said Mr. Dickinson, "originate from some body of technical experts and the process of passing them through the legislature can rarely add anything of value, since

<sup>1</sup> *Am. Bar Association Journal*, October, 1931

the members of the legislature do not have the competence to criticize them intelligently."

It must be admitted that resort to experts by President Franklin D. Roosevelt in order to battle with the great depression did not meet with such success as to increase enthusiasm for that procedure, but it should be recognized that the pressure of the need prevented well studied organization. The machinery for the huge task determined upon had to be put together hastily. Until time gives the right perspective, there should not be great confidence in judgment, but at the moment it seemed that too much was attempted, and that various reforms would have better been postponed until after at least some measure of recovery. The lesson was that in times of prosperity provision should be made against the needs of emergency. Such provision calls for the expert more than ever.

In most of our States one difficulty in the way of intrusting decision in these things to administrative officials appears in the number of them who are elected by the people. Experts are not well chosen by ballot. Appointment is the only prudent method. Until the short-ballot reform is accepted, administration will not be perfected.

There is, however, no reason why there should not be a small, continuing body to enact administrative legislation, the ordinances of the State. Strong feeling as to its desirability prompts me to repeat a proposal made in "Legislative Assemblies" (p 169), which had been urged upon the Massachusetts Constitutional Convention of 1917-19 by former Mayor Josiah Quincy of Boston and myself. We would have added administrative lawmaking to the duties of the Governor's Council. That group of eight members, with the Lieutenant-Governor *ex officio*, meets once a week through the year. It passes on the Governor's appointments and his recommendations for pardon, inspects the State institutions, canvasses election returns, gives more or less perfunctory attention to State finances, and has little else to do. Re-organized by constitutional amendment so that its members should be appointed by the Governor and confirmed by the Senate, one every two years so that the terms would be of sixteen years, thus largely eliminating partisanship, with salaries for a full-time job and with retirement allowances, such a body could and in my belief would better handle the administrative legislation that now burdens the Legislature.



so much than the committees of that body and than the Legislature itself. It should pass on all rules and regulations issued by the administrative agencies, handle personnel and salary problems, do everything of an administrative nature that a city council now does for a municipality.

Some such addition to the framework of the national government would in normal times be helpful and in times of crisis, with emergency powers of great scope given to administrative agencies, it would be of the greatest value. That is one lesson of the two years following the inauguration of Franklin D. Roosevelt. There was no machinery for co-ordinating and controlling the activities of what came to be known as the New Deal. Duplicating of effort, waste of time and money, confusion and delay, were the inevitable result. This was not the fault of the President or of any other individual, but sprang from the lack of adequate administrative machinery. That lack should be met.

We might take a lesson from a South American country, Uruguay. It has a Council of Administration with nine members chosen by direct popular vote, with proportional representation, for over-lapping six year terms. It divides executive power with the President, having jurisdiction over all matters of administration that have not been expressly reserved to the President or to other authorities. Its jurisdiction includes public instruction, finances, public works, labor, industries, agriculture, charities, sanitation. The Ministers in charge of these are appointed and may be removed by this Council and are completely responsible to it, not to the President.<sup>1</sup>

Uruguay presents up-and-down cleavage of the executive branch. My proposal was for such cleavage of the legislative branch. Switzerland, one of the best governed countries in the world, has long proceeded by way of union rather than cleavage. Its National Council of seven members exercises "the supreme directive and executive authority" and at the same time is the upper branch of the Federal Assembly, with its members having the right to speak though not to vote in the lower branch. The President is elected from its members.

Suggestion of another possible combination comes from Oklahoma. Its authors would have a nominal Governor, elected by the people as usual, who would represent the State officially.

<sup>1</sup> James and Marten, *The Republics of Latin America*, 316

He would appoint from the Legislature a chief executive officer, who would in his turn appoint the heads of all the governmental departments from the membership of the Legislature. He would initiate nearly all legislation, including the budget. In case of disagreement between him and the Legislature, he would resign or call a new election<sup>1</sup> This would be grafting the cabinet system on an American stock. Its proponents believe it would secure better appointments to administrative positions, would result in the selection of a man of proved ability for chief executive officer, would lessen jealousy of the administration by the legislative branch, and would place policies definitely before the people. Of course so novel an idea cannot expect immediate acceptance, even if it gets serious consideration, but it illustrates the growing appreciation of the need for some better system of lawmaking and law-administering than we have now.

#### ORDINANCES

With one form of administrative lawmaking by delegated authority we are so familiar that we rarely stop to reflect on its real nature. Our cities, towns, and counties are nothing but administrative sub-divisions of the State, and their ordinances are laws enacted under a delegated power. I know this is disputed. C. C. Binney says that, strictly speaking, municipal ordinances are not acts of legislation. "The charter, or the general municipal corporation law, as the case may be, is the legislative act which alone gives to these ordinances their vitality. They simply determine the manner in which and the extent to which the powers granted by that act shall operate."<sup>2</sup>

The distinction at the best is subtle. Is it really valid? How in essence does a City Council differ from a State Legislature as far as the delegation of power is concerned? It would not be generally admitted that a Legislature is the embodiment of popular sovereignty. The powers are not unlimited. Even in a Constitution as liberal as that of Massachusetts, in at least one particular there is restraint, for taxes must be "proportional," a limitation that has made no end of trouble. In most of the States there are numerous checks on the Legislature.

<sup>1</sup> Blachly and Oatman, *The Government of Oklahoma*, 121

<sup>2</sup> *Restrictions upon Local and Special Legislation in the U. S.*, 95.

That is to say, the people have delegated but part of their power. Can it be that delegation in the second degree, to a municipality, alters the case? If so, it must be true of all secondary lawmaking authority. As a matter of fact several of the Constitutions specifically delegate "legislative" power to counties. Michigan recognizes the legislative function in its county Boards of Supervisors to the extent of saying that they may pass such laws, regulations, and ordinances relating to purely county affairs, as they may see fit, if not opposed to general laws and not interfering with local affairs of cities, villages, or townships; provided such laws, regulations, and ordinances shall not take effect until approved by the Governor, save that if the Governor disapproves a measure, the Board of Supervisors may pass it over his veto by two-thirds vote.<sup>1</sup>

To whatever theoretical conclusions speculative discussion may lead, municipal ordinances are to the citizen just as much law as any other kind of law. Therefore he who commends the making of administrative law by delegated authority cannot escape whatever lessons may be drawn from this particular form of delegation. At first sight it would not seem easy for him to find encouragement in this direction. The towns, and especially the New England towns, might cheer him, but the story of the counties would make him sober, and that of the cities would make him sad. It is generally believed that we have disastrously failed in city government. This belief ignores the fact that a large part of our municipalities are excellently governed, but it is a belief that must be reckoned with not only because it exists, but also because as a rule it is warranted by the situation in the great centers of population.

Remedy may be sought in one of two opposite directions. There may be gain from less control by higher authority, or from more control by higher authority. Of these two courses, that which looks toward less control has had far the more of popular approval. It is commonly spoken of as "Home Rule for Cities." In some States it has reached the point of allowing cities to frame their own charters. In California the privilege is extended to counties as well as cities, and though in each case the charter must be approved by the Legislature, the approval must be as a whole, without amendment. In Oklahoma the Governor must approve a city charter if it be not in conflict

<sup>1</sup> Howell, *Michigan Statutes*, I, 495

with the Constitution or laws. In Missouri no approval is necessary

The vital defect of "Home Rule" lies in the fact that nowadays the welfare of the big city is in large measure identical with that of the State. Modern facilities for transportation and communication have knit the interests of a Commonwealth inextricably. Moreover, even among staunch supporters of democracy there is grave doubt whether the conditions of life in a big city warrant the hope that self-government based upon what is called universal suffrage will ever secure continuously good government, or even good government half the time. The lack of acquaintance, the ever-shifting population, the presence of large numbers not trained in self-government, the numerical preponderance of those without the ownership that brings home to men their personal stake in good government — these and other inevitable conditions make it altogether probable that American States will not abandon control over their great centers of population

The chances are that there will be more control, but of a distinctly different kind from that which is now exercised. Hitherto the State Legislatures have made laws for cities, with results that in many instances have been bad for all concerned. The special legislation has been accompanied by manifold evils. To avoid them there has been recourse to general legislation, with little gain. Few would question Professor McBain's conclusion: "I take it to be settled that the general prohibition upon special legislation for cities and the requirement that the Legislature should provide for the government of cities under general laws, has, speaking broadly, proved to be a lamentable failure in the States which have adopted this policy"<sup>1</sup>

Escape from the dilemma has been sought by combining State and city in municipal lawmaking. Under this plan the Legislature is to order, subject wholly or in part to the consent of the city. This was the purpose of the tentative step taken by New York in 1894. It was provided that every "special city law," i.e. one that relates to a single city, or to less than all the cities of any one of the three classes created on population lines — after passing both branches of the Legislature, should be transmitted to the Mayor for acceptance or not, his certificate thereof to be returned within fifteen days. "The Legis-

<sup>1</sup> To the Am. Acad. of Pol. Science, at New York, Nov. 20, 1914

lature shall provide for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon." If not accepted by the city, "it may nevertheless again be passed by both branches of the Legislature, and it shall then be subject, as are other bills, to the action of the Governor." According to Professor McBain this "has in very large measure, though not entirely, put an end to positive legislative interference in the affairs of cities" in New York. Professor F. J. Goodnow, also speaking of the working of a political system with that personal knowledge which alone is worthy of much confidence, testifies to the same effect. Writing in 1905 he said: "This method of limiting the control of the Legislature over local corporations has been successful in preventing a great deal of the most objectionable kind of special legislation. It has not, however, prevented the passage by the Legislature of special acts which have been regarded as of great importance by the party in control of the Legislature."<sup>1</sup>

Remedies of this sort are more likely to lessen the troubles of the cities than those of the Legislature. If Professor McBain was right in saying that "the city must eternally petition to be allowed to live its life as it desires," the corollary is that the Legislature must eternally answer the petitions of the cities. From the point of view of the pressure of legislative work, this is no small evil. Where shall we turn for the cure?

Why not to England? She appears to have solved the problem. Her solution is simple, logical, effective. It rests on the theory that a municipality is an administrative sub-division of the State. Supervision of a municipality is an administrative, not a legislative, function. Therefore, that supervision is put in the hands of a Board, the Local Government Board, which advises and directs and controls. To that sort of an administrative agency in every State of the Union ought to go nine tenths of the petitions and proposals concerning cities, towns, villages, counties, districts, that now vex and harass the Legislature.

Observe how these matters are now handled. If Massachusetts be typical, we already have Local Government Boards. They are legislative committees. Their members are chosen almost at random, with no special qualification to give expert administrative opinion, and with but limited chance to acquire ex-

<sup>1</sup> *Principles of the Administrative Law of the U S*, 178.

pertness by dealing with the same sort of problems year in and year out. Rarely are their reports upset in the Legislature itself, so that in effect they govern. Yet they are almost without responsibility. In other words, they are not punished or rewarded for their decisions save as these are items in a legislative record that in its aggregate may result in the ending or continuance of a political career. Nothing will happen to a man by reason of his vote on whether the City Engineer of Chicagopolis shall be appointed by the Mayor, or elected by the City Council, or chosen at the polls. There is no certainty that the committee member will know anything at all about the abstract principles involved in city or district problems, and the probability is strong that he will know nothing about the local conditions. He has no impartial inspectors to report the facts to him, but must rely on views often distorted by prejudice or self-interest. The marvel is not that he makes so many mistakes, but that he makes so few. It is by reason of the virtue of the doctrine of mathematical probabilities that he guesses right half the time.

You say this is exaggeration? Yet no man who has sat in a Legislature will deny that it has at any rate the color of truth. Again and again these petty local quarrels leave the conscientious legislator (and he is in the great majority) with the feeling that he has voted blindfold, in ignorance of the truth, without the help of unprejudiced advice. He is likely to end his service with the justifiable conviction that the system is all wrong.

Everybody admits that the cities on the Continent of Europe are better governed than those of the United States. There we find greater delegation of lawmaking power than in England. A French mayor can exercise by ordinance an authority which, in the cities of the United States, or of Great Britain, is very rarely committed to any official or even to an administrative board. It is not a mere administrative power that he has, but in a sense a delegation of the sovereign lawmaking prerogative of the state. The French, by giving a limited amount of actual legislative authority to the President of the Republic, the prefects, and the mayors, have secured a certain degree of elasticity and adaptability to local conditions in the substance of the law as well as in its administration.<sup>1</sup>

At the same time there is a high degree of control over the municipality by requirement of ratification on the part of central

<sup>1</sup> W B Munro, *The Government of European Cities*, 78

authority. Speaking in general terms it may be said that the continental legislatures have been inclined to give the local self-governing communities power to do anything for which they can get administrative approval. For example, in Prussia the law did not confer any specific powers, except in so far as this was done by general enactments for special matters (as education), but simply authorized the local authorities to do whatever they might think necessary or advisable in the interests of their localities—subject to the requirement that their proposals should be submitted for the approval of the central authorities.<sup>1</sup>

Percy Ashley points out that the difference between what we may conveniently call the English and Continental methods has this very important result, that in England the development of the activities of local authorities is conditioned and controlled by the temper and ideas of Parliament—that is, of the elected representatives of the nation; whilst in France and Prussia the deciding influence is exercised by a bureaucracy whose general ideas of policy in these matters may or may not be coincident with those of the majority of the nation. "It is impossible," he says, "to generalize as to the effect of this in practice; it may fairly be doubted if, under a system of bureaucratic control, there would have been so great an extension of some branches of local, and especially municipal, government, as we have witnessed in England in the last thirty years, though there is the example of Prussia to show that bureaucratic rule may be very enlightened, and ready to encourage and aid, in every way, the growth of local action and experiment. But against this there is the case of France, where (rightly or wrongly) the bureaucracy has steadily resisted most of the schemes put forward by the more enterprising municipalities."

The lawmaking of cities themselves is administrative. This encouraged the idea of commission government, combining legislation and execution in the same hands. Naturally it was then asked why the same idea could not be applied to State government. Governor George H. Hodges of Kansas was the first man of prominence to advocate this. He dwelt on the shortcomings of State Legislatures, and averred no reason existed for the bicameral system in an American State. In its place he urged a State Commission of one or two men from each

<sup>1</sup> Percy Ashley, *Local and Central Government*, 160

congressional district, paid enough to let them give all their time, and elected for terms of four to six years, subject to recall. The proposal aroused discussion in the West and South, and won much support. Should the experiment ever be tried, it must face in larger form the difficulties already apparent in the application of the commission idea to cities. No small body of men chosen for long terms will satisfactorily reflect the public will on disputed questions. Problems of policy in cities are few and comparatively small. In the State they are many and large. Administration predominates in the city, to a greater extent than in the State. To dispense with a sizeable lawmaking body for the State, would throw into a few hands the decision of grave questions of public policy that we Americans have so far believed can be best met by the concurrent judgment of minds numerous and varied enough to promise a fair reflection of public opinion. This a small commission cannot promise.

There remains occasion for at least passing reference to the relations between the legislative and executive branches on the one hand and the judicial branch on the other, which have been brought into prominence by the delegations of power from the legislative to the executive branch in the attempt to take the country out of the depression. The government has gone beyond all previous bounds in the way of controlling the relations and the affairs of the people, especially those of agriculture, industry and commerce. In so doing it has interfered with what were supposed to be vested rights of property and contract, has imposed new obligations upon individual citizens. In some cases it has given to other than courts of justice the power to impose penalties by way of fine or imprisonment. Without raising any question of the wisdom or expediency of this, it may be pointed out that new and important ground has been given for attention to the need of administrative courts such as are found in some European countries, notably France.

The need led the American Bar Association in 1932 to appoint a Special Committee on Administrative Law. Its reports to the Association meetings of 1933 and 1934 gave a comprehensive view of what had taken place, with discussion and suggestion worth the study of anybody interested in the subject.<sup>1</sup> The committee recognized that a Federal administrative court represents an ideal rather than something capable of immediate

<sup>1</sup> *Reports of American Bar Association*, vol 58, p 406, and vol 59, p 539



practical realization in all its details, and so it suggested that the judicial functions of Federal administrative tribunals be segregated from their legislative and executive functions, and be placed in an appropriate number of independent tribunals.

Reason for this the committee found in the fact that when judicial power is combined with executive or legislative power, a maxim fundamental to the administration of justice is disregarded, that a man should not be permitted to adjudge his own case "When an administrative tribunal is charged with investigation of alleged violations of the law or of its own regulations, and with the preparation and conduct (through its own attorneys) of the very proceedings on which it sits in judgment, and (again through its own attorneys) with the defense of its own decisions on appeal, it is doing exactly what the experience of ages has demonstrated to be unwise and, indeed, unworkable When an administrative tribunal is charged with the legislative power of making the very regulations, on violation of which it thereafter sits in judgment, it also sits as a judge with an interest in the cause, a disinterested interpretation of the regulations and an impartial and uniform application and enforcement of them can hardly be expected, and, indeed, as experience seems to indicate, are all too frequently lacking "

Because Congress had reposed judicial powers in agencies directly or indirectly under control of the Executive or of the Legislature, and provided no method of judicial review, or only a limited and inadequate method, the committee was apprehensive that these agencies were obliterating essential lines of our government structure and, for the original classic simplicity, were substituting a labyrinth in which the rights of individuals, while preserved in form, can be easily nullified in practice.

## CHAPTER XVII

### DELEGATION

How far a legislative body created by a Constitution may delegate the power of making law had been a subject of much controversy and had produced much litigation before Franklin D. Roosevelt became President. With his program for combating the great depression its importance far more than doubled, trebled, quadrupled, for he asked and Congress gave to him such right to issue ordinances and it was in turn entrusted to subordinate agencies in such degree as this country had never seen, had never deemed possible under our form of government.

From March 4, 1933, to June 15, 1934, as nearly as can be calculated, the President approved 674 Executive Orders, aggregating approximately 1400 pages, of which many were a combination of several parts (as high as fifteen) representing a number of separate orders. These were nearly six times as many as were issued from 1862 to 1900. Not included were the contents of the codes and amendments thereto, all of which, according to the act concerned, were to have the force and effect of law, with violation of any provision a criminal offense. To June 25, 1934, 485 codes and 95 supplements had been approved, averaging ten closely printed pages to each code and supplement. The Administrator for Industrial Recovery had up to June 16 issued 2998 administrative orders, providing for exceptions and exemptions, and covering a multitude of other activities of a legislative order. "The total legislative output by, or in connection with, this one administrative agency staggers the imagination. Any calculation involves guess-work but a safe guess would be that the total exceeds 10,000 pages of 'law' for the period of one year. This figure may be compared with the total of 2735 double-column pages which comprise the total of Federal statute law as set forth in the Code of Laws of the United States and the cumulative supplement of 1933. When the legislative production of other Federal administrative agencies is taken into account, it should not be difficult to demonstrate that the total volume of administrative legislation now

in force greatly exceeds the total legislative output of Congress since 1789.”<sup>1</sup>

Thus brought to the forefront, even though much of this was presently declared unconstitutional by the Supreme Court, the problem of delegation calls for serious study.

There is a common-law maxim — “*Delegata potestas non potest delegari*” — delegated power cannot be delegated. It is a cardinal principle of the law of agency and is based on the theory that the confidence in a delegated authority, being personal, cannot be assigned to a stranger by the person to whom it is given.<sup>2</sup>

The argument is that the selection of an agent is made, as a rule, because he is supposed by his principal to have some fitness for the performance of the duties to be undertaken. In certain cases his selection is owing to the fact that he is considered to be especially and peculiarly fit. The undertaking demands judgment and discretion, which he is supposed to have, or it requires the skill and learning of an expert, which he assumes to be, or personal force and influence are desirable, and these the agent is thought to be able to exercise; or honesty or even financial responsibility is relied upon, and thus the agent selected is supposed to possess. Here is the *delectus personae*, and it is obvious that unless the principal has expressly or impliedly consented to the employment of a substitute, the agent owes to the principal the duty of a personal discharge of the trust.<sup>3</sup>

Knights and Burgesses sent to Parliament were originally agents. Naturally the general doctrines of agency were applied to them. So when John Locke came to write his “Two Treatises on Civil Government,” there was no hesitation in his dictum (II, ch XI) “The legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the government, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, ‘We will submit, and be governed by laws made by such men, and in such forms,’ nobody else can say other men shall make laws for them: nor can they be bound by any laws but such as are

<sup>1</sup> “Report of the Special Committee on Administrative Law,” *Reports of the American Bar Association*, vol. 59 pp. 553-55 (1931)

<sup>2</sup> *Brewster v. Hobart*, 15 Pick. 302 (1834)

<sup>3</sup> *Mechem on Agency*, 305.

enacted by those whom they have chosen and authorized to make laws for them "

Yet when Locke wrote this, toward the end of the seventeenth century, members of Parliament had in fact ceased to be agents. They had become the embodiment of the sovereignty of the people of England. In the very year when Locke's book was licensed for printing, the supremacy of Parliament had been sealed by the Bill of Rights.

In England the old doctrine, although it had become a fiction, persisted in theory though not in practice. The lawmaking power has been delegated more and more freely until now a great part of subordinate law takes effect with only the formal approval of Parliament or with no approval at all. Sir G. C. Lewis sought to reconcile this with Locke's assertion that "the legislative cannot transfer the power of making laws to any other hands," by suggesting that by "transfer" Locke doubtless meant "transfer absolutely" or "without power of revocation." Thus construed, he held Locke's proposition to be strictly true, "since an absolute grant to any person or persons of the legislative power would be a communication to such person or persons of the sovereignty." <sup>1</sup>

Does the argument lead anywhere? Nobody nowadays is justified in believing that sovereignty is ever absolutely and irrevocably transferred. Louis XVI in the French Revolution, Nicholas Romanoff in the Russian Revolution, learned the fallacy of that. How, then, in pure theory can we discriminate between the conditional grant of power by the people of England to their Parliament, and the sub-delegation of that power by Parliament to an administrative Board? In practice, however, there are tangible differences. The people can resume their power only at the intervals of elections, or by the disorderly process of revolution, Parliament can resume its power at pleasure. The lawmakers chosen by the people may legislate as they will, those to whom they delegate lawmaking must not legislate inconsistently with existing laws. Acts of Parliament are now never questioned by any court, those of subordinate lawmakers may be annulled by a competent tribunal.

The agency doctrine as applied to lawmaking has lost its vitality in England, but survives in full force with us, a great hindrance to the development of good government. Though

<sup>1</sup> *On the Government of Dependencies*, 60 et seq

the harm be never so clear, statesmen and courts accept it, without reflection and without demur, as "one of the settled maxims in constitutional law that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." They assume it, to be established beyond the shadow of a doubt that "where the sovereign power of the State has located the authority, there it must remain, and by the constitutional agency alone the laws must be made until the Constitution itself is changed." They take it for granted that "the power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide the sovereign trust." <sup>1</sup>

The remarkable thing is that the expounders of the maxim themselves admit such serious modifications, limitations, and exceptions that a critic may fairly ask whether in fact it has anything but artificial vitality. For instance, Judge Cooley recognized that "fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the Legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulations usual with such corporations, would always pass unchallenged." <sup>2</sup>

Justice Bell, speaking for the Supreme Court of New Hampshire in 1855, put this even more forcibly and gave wider range to its influence. "It seems to be generally conceded," he said, "that the powers of local legislation may be granted to cities, towns, and other municipal corporations. And it would require strong reasons to satisfy us that it could have been the design of the framers of our Constitution to take from the Legislature a power which has been exercised in Europe by governments of all classes from the earliest history, and the exercise of which has probably done more to promote civilization than all other causes combined, which has been constantly exercised in every

<sup>1</sup> Cooley, *Constitutional Limitations*, 116, 117

<sup>2</sup> *Ibid.*, 191

part of our country from its earliest settlement, and which has raised up among us many of our most valuable institutions." <sup>1</sup>

Of course Judge Bell had in mind the town meeting with all the lawmaking power it exercised. Now that State and national interests have taken on such magnitude, it is hard to realize that up to a time within the memory of men still living, the great part of the law affecting the daily lives of men, their ordinary concerns, was local in its origin, either customary law as interpreted by the courts, or written law in the nature of by-laws and more particularly of the temporary laws passed at frequent intervals, directing how the money raised by taxation should be spent. To-day everything that town, county, or city does by statutory direction, charter authority, or prescriptive right is an exercise of power delegated either affirmatively or tacitly.

Nobody questions the delegation of local lawmaking. Objections begin when we enter what has now come to be the equally important domain of general administrative lawmaking. Here to a degree the necessities of the case are admitted. As Sir G. C. Lewis has pointed out, if executive officers had no legislative power, and if they could issue no other command than a special command founded upon a law previously made or sanctioned by the supreme legislature, the laws of the supreme legislature could hardly be executed. "So great is, in general, the difficulty of foreseeing numerous remote contingencies, and of exhausting them by legal provisions, that the most carefully considered and most skillfully executed work of legislation would scarcely stand the test of practice, unless it could be helped out with some subsidiary regulations made by the persons employed to enforce it. Moreover, it sometimes happens that a want of appropriate knowledge in the supreme legislature, and the scantiness of its time on account of the variety of the subjects which come before it, and successively claim a share of its attention, compel it to be comparatively vague and meagre in the composition of its laws, and to trust to its executive officers to supply the detailed regulations necessary for carrying its general regulations into complete effect."

It is perfectly clear that our legislatures do now delegate a not unimportant body of lawmaking power either local or administrative. What ground is there, then, for thinking that in

<sup>1</sup> State v. Noyes, 30 N. H. 279 (1855)

matters of government there is binding force in the maxim — "Delegata potestas non potest delegari"?

If it is because certain doctrines of agency are to be injected into political science, why not consider others? In a Massachusetts case it was held that "when, from the nature of the agency, a sub-agent or sub-agents must necessarily be employed, the assent of the principal is implied"<sup>1</sup> This would, of course, go only part way, for it could hardly be held necessary to delegate the making of broad, general laws. However, an Illinois court went farther in referring to "the principle repeatedly recognized by this and other courts of last resort, that the General Assembly may authorize others to do those things which it might properly, yet can not understandingly or advantageously, do itself"<sup>2</sup> This comes near entrusting it all to the judgment of the legislature, and anyhow makes it wholly a matter of somebody's discretion, either of lawmakers or of courts, as to whether delegation is desirable or not. If the doctrine is sound, it would seem to leave nothing whatever of the maxim forbidding sub-delegation.

Or approach the question from another angle. The courts and text-writers divide agents into two classes—special and general. A special power is a power to do a single act, a general power, to do all acts connected with a particular trade, business, or employment. Mechem says "Where the agent is authorized to transact all the principal's business of a certain kind, or all the acts of a certain class, the very breadth of the employment, the duration of time involved, and the variety of the duties to be performed necessarily involve more or less of discretion and choice of methods, and render impracticable, if not impossible, much of particularity or precision, either as to the exact means and method to be employed, or as to the scope or extent of the authority itself. Where so little is expressed, more may be implied. The fact of such an authority, of itself, presupposes a general confidence bestowed upon the agent, and a general committal to his discretion and judgment of all beyond the essential objects to be attained and the outlines of the course to be pursued. It may not unreasonably be presumed, where nothing is indicated to the contrary, that such an agent possesses those powers which are commensurate with his undertaking,

<sup>1</sup> *Dorchester and Milton Bank v. New England Bank*, 1 Cush. 177 (1848).

<sup>2</sup> *The People v. Harper et al.*, 91 Ill. 369 (1875).

and which are usually and properly exercised by other similar agents under like circumstances" <sup>1</sup>

Why may not the power of delegating the making of subordinate law be "commensurate with the undertaking" of a Parliament, a Congress, or even a State Legislature, overburdened with business, inexpert in matters of technical detail? And when that power is exercised by every lawmaking body in the world outside of the United States, might it not be said to be among those powers "usually and properly exercised by other similar agents under like circumstances"?

Furthermore, there is at least one particular in which it is admitted that if the principles of agency are to be applied to government, distinction is valid, for while the general rule is that when a naked authority is given to several persons jointly, they must all join in its execution, it has been repeatedly held that a majority may exercise a public trust. The reasons are evident. Here the point is made simply to show that discrimination is already customary.

#### ATTITUDE OF THE COURTS

Whether or not these suggestions have any weight, the insurmountable fact is that our courts have repeatedly undertaken to draw the line between legislative powers that may be and those that may not be delegated. There is no serious question about powers at what we may call the lower end of the scale — local powers and those of making minor regulations, such as the rules framed by a Commission for the conduct of its business. The powers of the middle ground, the twilight zone, are what now make most of the trouble, but it was with the powers at the upper end of the scale, the broad powers, that the controversy first took on importance.

Toward the middle of the last century, State Legislatures sought to avoid the vexatious problems of the liquor traffic by the passage of "local option" laws, shifting decision to the voters of the localities concerned. In various cases it was held, as, for example, in *Parker v Commonwealth*, 6 Pa. 507 (1847), that this was unconstitutional because a delegation of legislative power. The counter-argument was the well-recognized fact that a statute may be conditional, and its taking effect may be made to depend on some subsequent event. Chief Justice

<sup>1</sup> Mechem on *Agency*, par. 739



Redfield, a jurist of eminence, applied this in the case of *State v. Parker*, 26 Vt 357 (1854) "If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what may be the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one.... It seems to me that the distinction attempted between the contingency of a popular vote and other future contingencies is without all just foundation in sound policy or sound reasoning."

Other able judges took the same view and in the course of time their arguments prevailed to the extent of reversing the general course of the decisions. In Pennsylvania, *Parker v. Commonwealth* was overruled in 1873 by *Locke's Appeal*, 72 Pa 491. Justice Agnew, delivering the opinion, said "The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend" In this case the expression of a general opinion was the contingency on which the law should operate. The law itself as it came from the halls of legislation was a perfect law. The vote did not decide that the act should or should not be a law, for the law already existed. It was not delegated to the people to decide anything. They simply declared their views or wishes, and when they did so, it was the fiat of the law, not their vote, which commanded licenses to be issued or not to be issued.

In the following year the California court clarified the point somewhat, Justice McKinstry saying, in *Ex parte Wall*, 48 Cal 279: "It does not follow that a statute may be made to take effect upon the happening of any subsequent event which may be named in it. The event must be one which shall produce such a change of circumstances as that the lawmakers — in the exercise of their own judgment — can declare it to be wise and expedient that the law shall take effect when the event shall occur. A statute to take effect upon a subsequent event, when it comes from the hands of the Legislature, must be a law *in presenti* to take effect *in futuro*. On the question of the expediency of the law, the Legislature must exercise its own judgment definitely and finally."

Even if a legislature might submit to a local referendum vote what for convenience we may call special legislation, could it delegate the making of law to the electorate of the State at large? The Massachusetts Legislature asked this with other questions of the Supreme Court in 1894. Could an act to provide for woman suffrage in town and city elections take effect upon its acceptance by a vote of the whole State? Could it take effect in a city or town upon its acceptance by that city or town? In the State-wide referendum could women be authorized to vote? A perplexing variety of answers followed, the seven Justices submitting four replies. Four of them, however, answered No to all three questions, making that the position of the court as far as an "Opinion" in answer to legislative inquiry has weight. Two Justices answered Yes to all three questions, one answered Yes to the second, No to the other two.

The majority did not answer the second question in the negative by reason of its local option phase, but because of the nature of the suffrage power, its history in Massachusetts, and what seemed to them the need of uniformity. The third question does not bear on what we are here considering. The first question was the vital one for us — the question of the State-wide referendum. The majority held the weight of authority to be that a "general" law could be made to take effect upon such a subsequent event as a vote of the people; the substance of the transaction was that the legislative department declined to take the responsibility of passing the law, the law had force, if at all, in consequence of the votes of the people, they ultimately were the legislators, and the people had not by their Constitution reserved to themselves any direct part in legislation. Justice Oliver Wendell Holmes, Jr., afterward appointed to the Supreme Court of the United States, agreed that the discretion of the Legislature was intended to be exercised, and that confidence was put in it as an agent, but he thought so much confidence was put in it that it would be allowed to exercise its discretion by taking the opinion of its principal if it thought that course to be wise. He was not clear that the Legislature might not pass an act subject to the approval of a single man. Justice Barker said he was unable to see any sound distinction in this matter between general and local acts. The question was afterward settled for the time in Massachusetts by constitutional amendment (1913) authorizing the Legislature to submit laws to all

the voters, but this was repealed when in 1918 the full system of the Initiative and Referendum was adopted

The issue was brought to the courts in Illinois by a statute requiring the electorate to vote on the question of permitting women to serve on juries. In an exhaustive opinion the Supreme Court held that since the General Assembly alone had the legislative power, upon it alone rested the full responsibility of legislation<sup>1</sup> Chief Justice Dunn, giving the opinion, traced the doctrine down from what John Locke wrote in 1689: "The legislature can not transfer the power of making laws to any other hands, for, it being a delegated power from the people, they who have it cannot pass it over to others "

Although involving the same fundamental principle, the question of delegating lawmaking power to officers has a different aspect by reason of constitutional provisions for the separation of the three branches of government This has been pushed to the front chiefly where the legislative branch has tried to saddle the judicial branch with unwelcome tasks. A typical reply of the courts is that in *Hardenburgh v Kidd*, 10 Cal 402 (1858): "The Court of Sessions, under the Constitution, can only exercise powers of a judicial character The Legislature is incompetent to confer upon the Court any other powers. The assessment of taxes is not a judicial act, it partakes of no element of a judicial character It is a legislative act, it requires the exercise of legislative power, which, for certain governmental purposes in the County, may be devolved upon a Court of Supervisors, but cannot be delegated to any branch of the judicial department." An instance where the impropriety of delegating powers was relied upon, rather than the separation of powers, resulted from the attempt of the Massachusetts Legislature in 1914 to impose on judges of the Superior Court the duty of declaring an election void if they found corrupt practices had been committed. This was held unconstitutional in *Dinan v. Swig*, 223 Mass 516, on the ground that the House could not delegate its prerogative of judging the returns, elections, and qualifications of its own members

Much the greatest amount of delegation has been that to executive officials. Here the courts have arrived at conclusion on a variety of grounds The problem first reached the United States Supreme Court more than a century ago, in the case of

<sup>1</sup> *The People v Barnett*, 344 Ill 62 (1931)

*Brig Aurora v U S*, 7 Cr. 382 (1813) It had been argued that to make the revival of a law dependent on the President's proclamation was to give the proclamation the force of a law, and that Congress could not transfer the lawmaking power to the President The court, however, said "We can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct" In other words a presidential proclamation might be the condition giving life to a law.

This case was quoted and defended at length in *Field v Clark*, 143 U S 649 (1891). The Tariff Act of 1890 was at stake. The President was to suspend certain provisions for free entry in the case of countries imposing duties he might "deem" reciprocally unequal and unreasonable. "That Congress cannot delegate legislative power to the President," said Justice Harlan for the Court, "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution" The act under consideration was not inconsistent therewith The President would examine the commercial regulations of other countries, and would issue a proclamation on the ascertaining of certain facts In so doing he could not be said to exercise the function of making laws "He was the mere agent of the lawmaking department to ascertain and declare the event upon which the expressed will was to take effect"

In a dissenting opinion Chief Justice Fuller and Justice Lamar objected because the Act in giving power to the President used the phrases, "he may deem," and "for such time as he may deem just" However, this was by no means the first time that statutes had entrusted to Presidents the exercise of judgment as contrasted with mere fact-finding In June, 1794, Congress authorized Washington, "whenever, in his opinion, the public safety shall so require, to lay an embargo ... and to continue or revoke the same, whenever he shall think proper" Four years later Adams was empowered to discontinue suspension of commercial intercourse with France, "if he shall deem it expedient," etc When the Act making it unlawful to import from Great Britain was suspended until July 1, 1807, Jefferson was authorized to suspend further, "if in his judgment the public interest should require it." Monroe received the same sort of authority

in 1821. In 1830 certain tonnage duties were repealed, provided that President Jackson "should be satisfied" that certain discriminating or countervailing duties had been abolished, "so far as they operate to the disadvantage of the United States." In 1866 the law prohibiting the importation of certain cattle was to be declared inoperative whenever President Johnson, "in his judgment," held the importation might be made without danger.

In 1907 the conclusions of the Court in *Field v. Clark*, the *Brig Aurora*, and other cases involving delegation, were reviewed and reiterated in *Union Bridge Co. v. United States*, 204 U.S. 364

Whether or not it is yet beyond question that a President may be constitutionally empowered to exercise judgment and discretion, the Supreme Court would seem to have definitely established in the momentous case of *Hampton & Co. v. United States*, 276 U.S. 394 (1927), that he may be made the agent of the lawmaking department to ascertain and declare the event upon which its expressed will is to take effect. Such he was declared to be by Chief Justice Taft, delivering the unanimous opinion of the court sustaining the Tariff Act of September 21, 1922. Said the Chief Justice: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority."

Nevertheless so eminent an authority in matters constitutional as James M. Beck, who had been Solicitor General, continued to contest this when as a Representative he opposed giving President Hoover power to raise or lower tariff rates fifty per cent, and later in his trenchant book, "Our Wonderland of Bureaucracy," declared the opinion in the *Hampton* case "very unconvincing." Stoutly maintaining his position, he opposed, but in vain, the enlargement of the power sought by President Franklin D. Roosevelt in 1934. In passing and as an interesting sidelight on political inconsistencies it may be noticed that both Republicans and Democrats reversed them-

selves. The Democrats had vociferously opposed giving more power to Mr. Hoover, and had dwelt hard on the constitutional objection. Thus they forgot when Mr. Roosevelt requested. The greater part of the Republicans saw no constitutional obstacle until they were in the minority. In politics it does make a difference whose ox is gored. However, irony aside, it is to be said that this question is largely one of degree, and that the justifiable degree may change with external conditions. Courts and parties and people recognized that in time of great depression, just as had been the case in the period of the World War, stretching of the Constitution must be accepted for the sake of the public safety. Pragmatism prevailed.

This was the excuse through the depression for unprecedented delegation of legislative powers to the President and to administrative agencies, delegation that rightly alarmed all those who had seen in the Constitution inviolable guarantees of representative government and of individual liberties. Most notable was the delegation of the power placed by the Constitution in the hands of Congress, and of Congress alone, "To coin Money, to regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures." This power was turned over to the President, with no limitation that it be exercised upon the determination of any state of facts. To be sure, a goal was set — the restoration of the price level to that of 1926 — but a purpose is not a condition.

In part because of omission in this particular came the momentous decision of the Supreme Court in the so-called "Hot Oil" cases, January 7, 1935.<sup>1</sup> Under the authority supposed to be given to the President by the National Recovery Act "to prescribe such rules and regulations as may be necessary to carry out the purposes" of Title I of the Act, he had designated the Secretary of the Interior to prescribe rules and regulations and had approved a code for the petroleum industry prepared in accordance therewith. The validity of the code provisions was brought into court on the ground of unconstitutional delegation of legislative power. In deciding for the plaintiffs Chief Justice Hughes, speaking for all the other Justices save Justice Cardozo, set forth adequately the legal history of the basic issue, with citation of many cases, and then gave the reasons

<sup>1</sup> *Panama Refining Co. et al. v. A. D. Ryan et al.* *Amazon Petroleum Corporation et al. v. A. D. Ryan et al.*

why the requirements for effective delegation had not been met. The President was not required by the Act to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of facts, those determinations must be shown.

In dissenting, Justice Cardozo held that reasonable implication from the Act as a whole furnished the President with the necessary standard. The meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.

It will be noticed that in this matter delegation was to the President, with sub-delegation by him to the Secretary of the Interior, though the President resumed some of the sub-delegated power through the process of Executive Orders approving codes. Delegation by the legislative branch direct to administrators, rather than through the Chief Executive, may yet present a problem by itself. The Interstate Commerce Commission has long been "authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge," etc.,<sup>1</sup> and perhaps it has become established that Congress may authorize any administrative agency to exercise judgment. Such powers sometimes become established by prescription. For instance, in *U S v Midwest Oil Co*, 236 U S 450 (1915), the court, though with three dissenters, sustained the right of the President to withdraw public lands from private acquisition without special authorization from Congress, after Congress had opened them to occupation, the ground being acquiescence and implied consent of Congress, the practice having dated from an early period in the history of the government.

Apparently most other countries see nothing obnoxious in entrusting tariff changes to the executive branch, and letting

<sup>1</sup> U S Code, p 1660, sec. 15.

them take effect without reference to the lawmaking body. In some a report is to be made, but the change takes effect provisionally and continues in force unless disapproved by the legislature within a specified period <sup>1</sup> In England the Chancellor of the Exchequer recommends them as part of his annual budget speech each spring, and they become effective provisionally at midnight of the day of presentation. In the course of the session, if a special safeguarding committee makes a favorable report on requested change, and the Board of Trade agrees, the duties proposed are put into a Finance Bill and placed before Parliament for approval as an administration measure.

Australia goes to the length of omitting from its Constitution any provision precluding the Commonwealth Parliament from delegating power to make laws. Acts frequently confer power to make regulations for carrying out policies or giving effect to purposes outlined. By the Constitution of 1931 the Spanish Congress may authorize the Government to legislate by decree, concurred in by the Council of Ministers, concerning affairs reserved for the competence of the legislative power, but such authorization must not be general in character, and "Congress may claim cognizance of decrees thus issued in order to judge as to their adaptation to the rules established therefor." In no case, however, may an increase in any expenditure be authorized in this form.

#### ADMINISTRATION

Differentiating executives and administrative officials, with us the problem of delegating lawmaking power has become most troublesome in the administrative work of government, and in this field it bids fair more and more to embarrass or hinder normal development. Somebody must formulate details of execution. Inevitable, natural, and proper is the tendency to entrust this in greater or less degree to those who are to administer the law. That has always been the case. In all probability our ancestors saw the first important use of sub-delegated rulemaking power in the matter of the courts themselves. The judges could not have dispensed justice properly if they had not been allowed to make rules, and one of their complaints to-day, a legitimate and substantial complaint, is that Legislatures do not give them

<sup>1</sup> *Flexible Tariff Provisions in Foreign Countries*, U S Tariff Commission, December, 1929



a free enough hand in administering the judicial system. At times they have admitted the facts. For instance, in *Georgia Railroad v. Smith*, 70 Ga. 694 (1883), it was said: "Legislative grants of power to the officers of the law to make rules and regulations which are to have the force and effect of laws, are by no means uncommon in the history of our legislation." At other times courts have made declarations that would leave no validity whatever in this "by no means uncommon" practice. For instance, in *Cincinnati, Wilmington, etc., Railroad v. Commissioners*, 1 Ohio St. 88 (1852), it was averred: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority and discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done, to the latter no valid objection can be made." The same distinction was attempted in the same language in *State v. Chicago, M. & St. P. R'y Co.*, 38 Minn. 281 (1888).

Another line of cleavage between what is constitutionally right and wrong, has been sought in the difference between general and special laws. In 1907 the Board of Health of Cambridge, Massachusetts, refused to grant one Wyeth a certificate as an undertaker because he was not an embalmer, a rule to that effect having been made by the board of registration in embalming. In *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, the court, speaking by Chief Justice Knowlton, held that the rule about the issuing of permits and some of the other rules of the board, purported to change the general laws on this subject applying to all the people in every city and town of the Commonwealth, and that if the statute were construed to authorize the making of such rules, it would be held unconstitutional. On the other hand, when in *Noel v. The People*, 187 Ill. 587 (1900), part of the Illinois pharmacy law was held unconstitutional, because it provided that the Board of Pharmacy, "in their discretion," might issue permits to sell remedies and medicines, the court said: "A law which thus invests any board, or body of officials, with a discretion, which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid." Again, in California a statute authorized the Commissioner of the Bureau of Labor Statistics to direct the providing of certain mechanical devices in workshops where he might deem them needed. It was held that this was not a duty

to enforce a law of the Legislature, but the power to make the law for the individual, and to enforce such rules of conduct as the Commissioner might prescribe. "It is thus arbitrary, special legislation, and violative of the Constitution," said the court<sup>1</sup>

It may be urged that the granting of a permit or the issuing of an order to an individual is not the making of a law, and yet it is just as much a special law as any of hundreds of special laws enacted every year. Likewise it may be urged that in the *Wyeth* case the court was speaking of board-made general rules that change existing laws, but if a board-made rule changes status, what difference does it make to the individual whether or not that status had previously been recognized or created by enactment? In either case is not the issuing of the rule the making of law?

Still another test has been looked for among the shadowy, baffling mysteries of the police power. In *Martin v Witherspoon*, 135 Mass 175 (1883), it was held that pilotage regulations "are in the nature of police regulations, the making of which, within defined limits, may be entrusted to other bodies than the Legislature." They were held to be not a surrender of the power of legislation to the Governor and Council. Likewise the vaccination case of *Blue v Beach*, 155 Ind 121 (1900), upheld the right of the Legislature to delegate to Boards of Health the power to make rules and regulations, provided they are reasonable and do not enlarge or vary the powers conferred by the Legislature. On the other hand, it was held in *State v. Burdge*, 95 Wis 390 (1897), also a vaccination case, that statutory provisions authorizing the board to make such regulation "as may in its judgment be necessary for the protection of the people" from contagious diseases, are "an unwarranted delegation of legislative power."

Equally difficult will the layman find it to reconcile views of the courts in what may seem to him to be matters of purely administrative detail. Thus in *Brady v Mattern*, 125 Ia 158 (1904), the court said it saw no reason why the Legislature could not authorize the Executive Council to determine whether the plans and methods in accordance with which the building and loan business is to be conducted by any particular association, are fair, reasonable, and in accordance with public policy. Yet in *O'Neil v Am Fire Ins Co*, 166 Pa 72 (1895), the court held invalid the power given to the Insurance Commissioner to pro-

<sup>1</sup> *Schaezlein v Cabaniss*, 135 Cal 466 (1902)

vide the form for a standard insurance policy. Likewise Attorney-General Dana Malone of Massachusetts advised the Insurance Committee of the Legislature, April 21, 1909, that in his opinion an "act in effect authorizing the Insurance Commissioner to establish such standard insurance forms as he might deem applicable in the premises, without in any particular indicating what should be included therein," gives "an authority so sweeping that it cannot be deemed to be the mere working out of details under a legislative act, or determination of facts upon which the application of a law has been made to depend, or discretion in its execution, but is rather an authority to change the law itself," and therefore unconstitutional. He pointed out that the well-established authority of the Commissioner "to approve the form or substance of certain policies of insurance, rests upon some statutory declaration of the essentials which such policy shall contain, and that the function of the Commissioner is to determine, as a ministerial officer and in the management of the details in the administration of the law, whether or not such policy conforms to the requirements of law, his determination being subject to judicial review."<sup>1</sup>

Equally vain as a test would seem to be the matter of penalties. A rule that cannot be enforced is not worth much as a rule. Indeed it might be argued that law implies enforcement. Yet in *Ex parte John Cox on Habeas Corpus*, 63 Cal. 21 (1883), it was held that the Legislature had no authority to confer on the Viticultural Commissioners the power to declare what acts should constitute a misdemeanor. In another California case, *Harbor Commissioners v. Redwood Co.*, 88 Cal. 491 (1891), Justice Garoutte said for the court "Conceding that the Legislature could delegate to the plaintiff the authority to make rules and regulations with reference to the navigation of Humboldt Bay, the penalty for the violation of such rules and regulations is a matter purely in the hands of the Legislature.... The board of harbor commissioners is a creature of the statute, and purely an executive body, and the fixing and imposing of penalties are matters of which the Legislature alone has cognizance." Again in California, but this time in the Federal Court, Judge Wellborn, in *U.S. v. Blasingame*, 116 Fed. 654 (District Court, S D California, 1900) held to be void a provision of the sundry civil appropriation act of June 4, 1897, mak-

<sup>1</sup> *Opinions of the Attorney-General*, III, 221

ing it a crime to violate any rule or regulation thereafter to be made by the Secretary of the Interior for the protection of forest reservations.

On the other hand in *U.S. v. Breen*, 40 Fed. 402 (Circuit Court, E D. Louisiana, 1889) Justice Lamar held that an act authorizing the Secretary of War to make certain rules and regulations, and constituting violation thereof a misdemeanor, did not confer legislative authority, as he was authorized only to make the rules, and it was the act of Congress that declared the violation a misdemeanor. He said numerous decisions by the Supreme Court of the United States could be cited to sustain this. In *Pierce v Doolittle*, 130 Iowa 333 (1906), where the appellant contended that crimes punishable under the statutes of the State must be prescribed by statute and cannot be left for determination to boards or tribunals whose rules and regulations are not prescribed by the Legislature itself, the court thought it clear the Legislature might provide for the punishment of acts in resistance to, or violation of, the authority conferred upon such tribunal or board

This view was elaborated by the Supreme Court of the United States in 1908. It had been held in the case of *Wong Wing v. United States*, 163 U S 228 (1895), that while Congress might forbid aliens to come within our borders, it could not subject them to infamous punishment or confiscation of property, without judicial trial to establish guilt. When this was relied upon in *Oceanic Navigation Co v. Stranahan*, 214 U S. 320 (1908), Justice White for the court drew the distinction that the section of the act in issue in this case did not purport to define and punish an infamous crime, or indeed any criminal offense whatever. The court went on to support the conception that it is within the competency of Congress, "when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power"

Another criterion has been sought in the broad proposition that the Legislature may not delegate the power to lay down rules by which courts of law must determine the rights and obligations of others. Such a principle would justify some of the decisions already quoted or a decision like that in *State v. Great Northern Ry. Co.*, 100 Minn. 445 (1907), which held to

be void as a delegation of legislative power a statute that permitted a commission in its discretion to authorize increases in the capital stock of railroad corporations and to prescribe the manner in which such increase should be made. The embarrassment for this criterion lies in the palpable fact that the courts are constantly enforcing rules prescribed by Boards of Health, Park Commissions, and various other administrative agencies, rules which do determine the rights and obligations of others. They are doing this, too, in spite of constitutional injunctions that the legislative, executive, and judicial departments shall be kept forever separate. And they thereby recognize that the generalization is an ideal to be approached, not attained.

A technical difficulty in the way of delegation has been represented as existing in those States, about half the total, with constitutional specifications about the manner of enactment. Some say no law shall be enacted, some say no law shall be passed, except by bill, and often the form of the enacting clause is set forth. The style provision in Iowa — "Be it enacted by the General Assembly," etc. — was held in *Santo et al v Iowa*, 2 Ia. 164 (1885), to prevent a bill from becoming law by vote of the people. This is a quibble that will hardly win general acceptance. It would take some hardihood to argue seriously that Constitution-makers, when drafting such provisions, had in mind anything but the formalities of legislative procedure. No such pretext has ever been allowed to interfere with the delegation of law-making authority to municipalities. It is not likely to go far in preventing delegation to administrative agencies.

The Constitutions contain no direct prohibitions against the delegation of power. That raises a question which bids fair to take on some importance by reason of the spread of the Initiative and Referendum. Assuming that the implications of a Constitution might warrant courts in forbidding a Legislature to delegate its lawmaking powers, could the people delegate theirs? The Initiative and Referendum amendment drawn by the Massachusetts Convention of 1917 contained the proviso that "the limitations on the legislative power of the General Court in the Constitution shall extend to the legislative power of the people as exercised hereunder." It was urged upon the Convention that it was exceedingly desirable to make possible the drafting of the technical details of complicated laws, by

agencies specified in the measure submitted to the people. For example, it might be wise and prudent to determine at the polls whether or not the people wanted an old-age pension system, and it might be wise to have them say whether they wanted it contributory or non-contributory. Everything beyond this, it was urged, could best be left to experts, as, for instance, to a commission appointed by the Governor, its administrative recommendations to become law when approved by him.

The advantages are evident. The Initiative and Referendum system contemplates that measures will be drawn by partisans, earnest and sincere, to be sure, but enthusiasts. Universal experience tells us that enthusiasts are apt to be somewhat visionary, unpractical, academic. Hardheaded men of affairs are not likely to predominate in a group of zealots. We do not expect the soundest judgment in matters of detail from one-idea men. Such men are invaluable, but dangerous. In preparing complicated measures they will not hasten to invite critics to their conferences. Suggestion of flaws, defects, inconsistencies, will not be welcomed cheerfully. The chances are against even such scrutiny and controversy as go on in the room of a legislative committee. Already the committee system has been found inadequate to the proper framing of administrative detail. Already the tendency is toward the employment of bill-drafting experts and the use of advice from department heads or outside authorities. Is it not a pity to turn backward by inviting technically bad statute-making at the hands of the men most likely to make use of the system of direct legislation?

The manifest remedy will be blocked if it is held that the people themselves may not delegate any of the legislative power. As a rule the provisions for the Initiative and Referendum say that the people reserve to themselves the power to submit laws to the people for approval or rejection, or words to that effect. It is made clear that this is but a fraction of the whole legislative power, the rest remaining vested in the Legislature. Strict constructionists might go so far as to hold that what powers of delegation the courts grudgingly concede to the Legislature, are not included in the fraction thus reserved to the people. The Legislature itself may with force contend that what is not forbidden in the Constitution is granted. Less than half the Constitutions make any attempt at all to define the powers of the Legislature, and most of those that do make the attempt are so

vague that they do not directly hamper. The provisions for the Popular Initiative, however, are so framed as to leave less if any ground for implication. Whether or not argument of this sort would hold water, it is clear that the people secure to themselves no explicit authority to entrust experts with providing the details for carrying out their will. Unless this is provided, direct legislation may be seriously handicapped in meeting the expectations of its friends.

The depression that began in 1929 brought out sharply the need for greater elasticity in State processes. Since the Legislatures of most of the States meet in regular session but once in two years and Governors are reluctant and slow to call special sessions, often emergencies are not swiftly met by new laws. This was one of the reasons why resort to Federal aid became so general, even by States that as a result of the workings of our income tax system could at far less cost to them have handled their relief problems each for itself, assuming the other States were not allowed to dip into the Federal treasury. Perhaps this experience will teach State Legislatures the wisdom of giving the executive branch more latitude in the exercise of judgment, at any rate in times of emergency. Surely there will be no great danger of abuse, at least in respect of minor powers, if regulations are to be submitted to the next session of the Legislature and so be exposed to speedy nullification.

#### STATUTORY ORDERS

Opportunity to nullify or confirm is the salient feature of the remedy for a score of legislative ills that has been applied in England with marked success. It is known as the Statutory or Provisional Order system. After the Reform Bill of 1832 there was a striking increase in lawmaking. The burden it imposed on Parliament became excessive. Disraeli, writing "Sybil" in 1845, said the House of Commons presented, "on studious inspection, somewhat the character of a select vestry, fulfilling municipal rather than imperial functions, and beleaguered by critical and clamorous millions." In the very next year relief began by starting to let administrative departments attend to details. Gradually it became more and more common for Parliament to confine statutes to general principles, and to authorize departments to apply these principles and to supplement the broad commands with needed rules and regulations.

Statesmen awoke to the fact that this was a logical sub-division of labor. John Stuart Mill said in the House of Commons: "When a popular body knows what it is fit for and what it is unfit for, it will more and more understand that it is not its business to administer, but that it is its business to see that the administration is done by proper persons, and to keep them to their duties." Mill also laid down the principle: "The Parliament of a nation ought to have as little as possible to do with local affairs." Gladstone said to the electors of Greenwich in 1874. "The duties of Parliament have reached a point where they seem, for the present, to defy all efforts to overtake them. I think we ought not only to admit, but to welcome, every improvement in the organization of local and subordinate authority which, under the unquestioned control of Parliament, would tend to lighten its labors and to expedite the public business."

By 1893 the transfer of subordinate lawmaking to administrative boards had reached the point where it was advisable to publish the annual grist of Statutory Orders separately from the Public General Acts. Now the Statutory Orders make a volume, sometimes two volumes, much thicker than the book that astonishes an American when he is told it contains all the general laws enacted in a year for the vast British Empire. To the extent that modern Acts of Parliament are dependent upon subsidiary legislation, these "incomplete statements of law," as Cecil T. Carr describes them, make up more than half the whole.<sup>1</sup> Another authority, G. F. M. Campion, says that about one in two Acts every session makes use of the machinery for delegating power to issue rules and orders for the purpose of supplementing its own provisions.<sup>2</sup>

The system, like nearly all useful political systems, having been a growth and not an invention, has irregularities that impede scientific tabulation. Delegated powers range from the trivial to the important, from the mere making of rules for the internal affairs of a department to the serious matter of making what are in reality laws for the conduct of great undertakings such as municipal services, or affecting the everyday life of millions, as in matters of health or education. Not always with logical precision, yet with some approach to fitness, the trivial

<sup>1</sup> *Delegated Legislation*, 1

<sup>2</sup> *An Introduction to the Procedure of the House of Commons*, 295



things are put within the complete control of departments, the rules of somewhat more importance take effect if Parliament does not forbid, and those of the greater importance take effect when Parliament has given specific approval. Those rules that are to take effect if Parliament does not object, are laid before it in order that a resolution of disapproval may be passed within a certain prescribed period, customarily forty days. Those to which Parliament must give positive approval are grouped each year into a series of consolidated measures known as Provisional Orders Confirmation Acts and are passed through the usual stages of legislation. In some cases an order goes into one class or the other according as it is unopposed or opposed. Technically the term "Provisional Order" applies only to an order that is to take effect if not disapproved, but its common use extends to those orders that are passed upon much like other private bills. "Statutory Order" more accurately describes, and might well be preferred for American use.

The application of the system in England has been chiefly, though not wholly, to local matters. Five ministerial departments are:

- (1) The Home Office, under a Secretary of State, concerned with local police matters, sanitary duties under the Factory Acts, the administration of the Burial Acts, the inspection of reformatory and industrial schools, and a few other matters.

- (2) The Local Government Board, composed nominally of a number of Privy Councillors, but with the work actually done by a President and two Secretaries, one Parliamentary (politician) and one permanent (civil servant), it is the directing and controlling authority in matters of poor laws, local finance, health, sanitation, and a variety of miscellaneous matters.

- (3) The Board of Trade, also nominally a committee of Privy Councillors, but in fact with the same organization as the Local Government Board; its chief local responsibilities concern "municipal trading" enterprises, what we call "municipal ownership."

- (4) The Board of Education, similarly organized, with duties indicated by its title.

- (5) The Board of Agriculture, differing only in that it has no Parliamentary Secretary; brought into contact with the local authorities only with reference to the Diseases of Animals Acts, the destruction of insects, and public markets.

These departments, each in charge of a minister of Cabinet rank, are entrusted with the direction, control, and guidance of the local authorities, under the general supervision of the Cabinet, and ultimately of Parliament. For the purposes of direction they all possess what are called "sub-legislative" powers; that is, they are empowered by the legislature to issue orders and regulations for the detailed application and enforcement of its enactments. Connected with this is the discretionary grant of powers to local bodies, it is common for Parliament to bestow certain powers upon all local authorities of a particular class, but to make the exercise of them dependent, in each particular case, upon the approval of the department particularly concerned. The approval of the controlling authority is required for many acts proposed to be done by local bodies, such as the issue of by-laws, dealings with municipal property, housing schemes, loans, and many other matters which the legislature has sanctioned in principle, but leaves to be determined in particular cases by the departments. It is the duty of the controlling authority to see that the local authorities carry out the positive directions of the law, and (in the event of persistent neglect) to take the necessary steps to enforce obedience.<sup>1</sup>

When an English municipality wishes to borrow money or to undertake an enterprise such as a system of water-works, it does not ordinarily petition for a special act, as often with us, but applies for a provisional order. Thereupon an inquiry is conducted or a hearing is held by an inspector of the central Board. Upon the basis of his report an order is issued or refused. There is no appeal. Against the chance of hasty and ill-considered action a practical safeguard has been furnished by the Rules Publication Act of 1893, requiring the publication of a preliminary draft for criticism. With some exceptions this applies to all rules that are to be laid before Parliament.

Contrast this with the American procedure and several distinct advantages in the English system are evident. The preliminary inquiry in England is made by an unprejudiced expert, presumably not open to political or other unfortunate influences, instead of as with us by a legislative committee made up of men usually without technical training and always exposed to partisan, factional, or personal pressure. The order is issued from or refused by an office constantly concerned with similar

<sup>1</sup> Percy Ashley, *Local and Central Government*, 16 *et seq*

problems, possessing a great body of accumulated experience on which to draw. Such an office has given scientific study to the results of its previous orders. It knows.

An improvement was doubtless contemplated in the Act of 1899 that made a sweeping change in the procedure in regard to private legislation for Scotland. This act substituted Provisional Orders for Private Bills, but modified the English system by giving the task of inquiry to a committee of members of Parliament or unofficial persons, instead of to a department. If a proposal relates only to Scotland, does not raise large questions of policy, and is not of great magnitude, procedure is to be by Provisional Order. If there is no opposition, the Secretary for Scotland may grant the order with or without inquiry, as he sees fit. If there is opposition, the proposal is referred to a committee drawn from a body of Commissioners consisting of fifteen members of each House of Parliament, and twenty other persons, "qualified by experience of affairs" and appointed by the Lord Chairman and the Chairman of Committees, in conjunction with the Secretary for Scotland. The "extra-parliamentary panel" is to be drawn upon only when the necessary committees cannot be formed from the Parliamentary members of the Commission; but the requirement that the inquiry shall be held in Scotland causes this panel to be much used.

A committee may recommend grant of the Order as proposed, or modified, or it may advise refusal. If the Secretary of State follows advice to refuse, there is no appeal, if he grants the Order, he introduces a Confirmation Bill in the next session of Parliament, which of course is open to contest. It will be seen that this plan does not leave the inquiry (and practically the decision) solely to the permanent officials of a Government department. Such a bill is very rarely opposed and almost invariably it passes through all the stages with great rapidity. Provisional orders have almost entirely supplanted private bills in Scotland, and are gradually superseding them in England.<sup>1</sup>

In this field Orders in Council are now employed only to give a departmental order more than departmental authority.<sup>2</sup> In such matters as, for example, the regulating of trade, commerce, and even private life in time of war, use continues of prerogative

<sup>1</sup> G. F. Campion, *An Introduction to the Procedure of the House of Commons*, 281. Percy Ashley, *Local and Central Government*, 325.

<sup>2</sup> John Willis, *The Parliamentary Powers of Government Departments*, 17.

Orders in Council, being what is left of the original sovereign power of the Crown to legislate without the authority of the Houses of Parliament.

The provisional order system has succeeded because in matters of detail Parliament has been so willing to accept the orders that petitioners deem it useless to press any but really weighty objections. It is rare that any order is stricken from a Provisional Orders Confirmation Act. Indeed in the course of forty years only about thirty-five out of nearly four thousand Provisional Orders, less than one per cent were rejected by Parliament.

Of course the system has not developed without protest. For example, a writer in the *Saturday Review*, May 7, 1870, showed the traditional attitude of the ultra-conservative. "No modern innovation," he declared, "needs to be watched with more jealousy than the practice of delegating the authority of Parliament (even in small and local matters), with no better check than the chance that some unusually vigilant legislator may move an address to reject the scheme of law before it has had time to mature into an indefeasible enactment. The whole scope and genius of our legislative system is to afford by the forms of Parliament every possible security that no law shall be made which has not been deliberately and repeatedly affirmed in all its details, and it would be alien to the essence of free government to substitute for this a system in which the relations of the Crown and Parliament should be reversed." Experience gave the practical answer to such fears. No disastrous results followed.

On the other hand, the gain in convenience was palpable. It was found that much of the work taken from Parliament was done more economically and efficiently than before. "The legislature obtained the concurrent advantage of relief from embarrassing functions of no general interest, and was able to devote the time, which it thus saved, to other and more comprehensive duties."<sup>1</sup> The balance of benefit became so clear that Cecil T. Carr asserted "No one who looks at a collection of the annual output of delegated legislation can seriously propose that Parliament should now cancel the concession of legislative power and should undertake for the future under its own direct authority all the legislative activities which at present

<sup>1</sup> Spencer Walpole, *The Electorate and the Legislature*, 133

are left to His Majesty in Council or the various public departments."

Nevertheless criticism continued, ripening into a storm of protest in both Houses in the spring of 1929, largely because there had been inserted in various Acts the words "to remove difficulties," which gave the Government power to modify the Act as experience with it might from time to time show to be desirable. In that year also the Lord Chief Justice, Lord Hewart of Bury, wrote a book. "The New Despotism," vigorously attacking the system, especially in its relation to the courts, thus adding fuel to the flames. As a result of the outcry there was appointed a Committee on Ministers' Powers, consisting of seventeen distinguished men and women experienced in public affairs. Its report, in April, 1932, may be accepted as authoritative.<sup>1</sup>

In support of its conclusion that "the system of delegated legislation is both legitimate and constitutionally desirable for certain purposes," it gave reasons that may be summarized as follows. pressure on parliamentary time, technicality of subject matter ("cannot be effectively discussed in Parliament"); unforeseen contingencies, flexibility (constant adaptation to unknown future conditions without the necessity of amending legislation), opportunity for experiment, meeting emergency needs

As ground for objection the committee recognized skeleton legislation, resulting in a serious invasion of the sphere of Parliament by the Executive, inadequate scrutiny in Parliament; the rights of the subject (who may be deprived of protection by the courts against harsh or unreasonable action by the Executive), loosely defined powers, difficulty of securing full publicity, difficulty of obtaining redress, volume, leading to widespread distrust of the machinery of government, and actually endangering civic and personal liberties.

The committee found that legislative powers were delegated freely by Parliament without members fully realizing what was being done, and that there was no automatic machinery for effective scrutiny by Parliament as a whole of regulations submitted. It recommended a standing committee of each House to scrutinize every bill proposing to confer legislative powers on Ministers and every regulation laid before the House, the

<sup>1</sup> Sessional Papers, 1931-32, vol 12, Cmd 4060

purpose not being to go into the merits, but to inform. Also the committee stressed the importance of clearly defining the powers granted. What the system lacks, the committee thought, is coherence and uniformity in operation. Its defects are the inevitable consequence of its haphazard evolution. "For the most part the dangers are potential rather than actual, and the problem which the critics raise is essentially one of devising the best safeguards."

Miss Ellen Wilkinson, a member of the Committee, added to its report a "Note" that showed judicious conclusion from her own experience in the House of Commons and that might well be weighed by anyone hoping to better American methods. "Parliament," said Miss Wilkinson, "can only deal really effectively with the principle and general plan of proposed legislation. The details should be left to the experts. This would make it possible for the House of Commons to discuss thoroughly and intelligently the broad outlines and enable a more real control over the Executive to be exercised than can possibly be the case when Parliament becomes an obstacle race, the sole duty of the Opposition being to provide the hedges and ditches on the course. In my view it would be better if the Committee stage of a Bill, as we now understand it, did not come before Parliament at all. If a second reading debate settled the general principles and approved the plan, the draft could be handed over to the experts to settle the details within that framework, the House giving a further general consideration to it, to see that this has been done. Such a procedure would cut out mere obstruction, and secure that the Bill really expressed what Parliament intended should be enacted. It would prevent amateur amendments being rushed into a Bill, perhaps by one of those emotional waves to which the House of Commons is notoriously subject, and which often cause lengthy and bitter litigation when the Act is put into operation."

In a further "Note" another member of the committee, Professor Harold J. Laski, well known as a profound student of political science, said he was in complete agreement with Miss Wilkinson's emphasis upon the desirability of delegated legislation.

The concentration of parliamentary time and energy on the important problems is the advantage that ought to appeal most to American intelligence. A list of the English statutes of 1786

shows 160 so-called public acts, and 60 so-called private acts, with half the public acts really of a petty local character. In 1916, despite the huge growth of the Empire and the great extension of the range of governmental activities, the Public General Acts numbered only 71, and the Local and Private Acts (including Public Acts of a Local character) were of just the same number. Compare the total, 142, with the product of the General Court of Massachusetts in the same year, the legislation for a State with a population less than one per cent of that of Great Britain. The Massachusetts figures were, according to the official classification, of General Acts, 308, of Special Acts, 374, of Resolves, 164: total, 846.

The figures of the Massachusetts classification are misleading. As a matter of fact many of the statutes printed as General Acts would come under a legitimate application of the Statutory or Provisional Order system. It would be no exaggeration to say that not one in ten of the measures enacted ought to have engaged the attention of 280 lawmakers, and if their attention could have been concentrated on four-score measures of real public importance, far better results would have been secured, to say nothing of the possibility that much useful work necessarily postponed would have been accomplished.

To the advantages that were found in England by the Committee on Ministers' Powers, experience with American legislative bodies would add that of escape from partisan conflict over details. This appears in committee rooms much less often than is supposed, but on the floor of House or Senate, where votes may be prompted by political loyalty to or enmity toward the proponent of an amendment, unfortunate results in matter of detail may follow.

Also should be taken into account the value of opportunity to perfect a statute without waiting to go through the slow and uncertain process of amendment by a legislature. Few are the statutes that put to the test do not develop minor weaknesses. No small part of the time of legislative sessions is now devoted to their corrections. Many others would keep the machinery of government from creaking so much if the engineers were allowed to tighten a bolt here or loosen a nut there.

To the English disadvantages enumerated, an American might add the danger from lack of harmony and consistency where separate, independent agencies are at work. This danger be-

came conspicuous when what was known as the New Deal went into operation in 1933. For instance, part of its forces, with the producer in mind, had for their prime object the raising of prices; another part, with the consumer in mind, strove to keep prices from rising. There was no uniformity in the hundreds of codes, the rules and regulations, that were to be in effect the laws for industries. Some were drastic, some were weak. Some had penalties more severe than others. Some were long, some were short. In many other directions conflicts of judgment and decision appeared, because of lack of co-ordination. Had this all been done by one lawmaking body, confusion might have been escaped. It could not have been done by any lawmaking body we have to-day. The recourse? A small central body of administrative lawmakers to co-ordinate and control all administrative lawmaking.

Another disadvantage argued is of kindred nature — lack of balance. In Congress and the State Legislatures each committee naturally thinks the activities with which it is concerned to be of superior importance. The House and Senate are expected to have some sense of proportion. That cannot be expected of administrative officials. This want also could at least in some measure be met by a central administrative authority.

Possible abuse of power is feared by some. Toward this Lord Hewart directed the greater part of his criticism in "The New Despotism," arguing that English administrators were usurping the powers of the judiciary. With us the situation is different, for our written Constitutions make undisputed the right of the citizen to take his grievance into court. Evidence of this in plenty was given by the number of cases brought there after the National Industry Recovery Act got underway. Of course it means unfortunate expense and delay, but the fact that in the end the rights of the citizen will be protected is of itself enough to make administrators cautious.

The argument that vesting quasi-legislative powers in administrative officials sets up a temptation to official corruption and extortion has been well met by Professor John Dickinson, in the course of an admirable and exhaustive address<sup>1</sup>. He says rightly it is hard to see how this danger is any greater than in the case of powers necessarily invested in such officials to enable them to perform duties of law enforcement. Opportunities for

<sup>1</sup> *American Bar Association Journal*, October, 1931.



corruption and extortion exist wherever powers of any kind are vested in officials, but unless officials are vested with power of some kind, there is no excuse for their existence. The only way to eliminate completely the temptation and opportunity to abuse an office is to abolish the office.

In principle the idea of delegating rulemaking power, whether in full or subject to confirmation, is already at work here. Justice Holmes, dissenting in *Springer v. Philippine Islands*, 277 U S 189 (1928), pointed out that Congress has established the Interstate Commerce Commission, which does legislative, judicial, and executive acts, only softened by a *quasi*, makes regulations (Intermountain Rate cases, 244 U S 476, 486), issues reparation orders, and performs executive functions in connection with Safety Appliance Acts, Boiler Inspection Acts, etc. Congress has made effective excursions in the other direction. "We do not and cannot," said the Justice, "carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires." In this Justice Brandeis concurred.

There might have been added the fact that the President is empowered to make rules for the Patent Office, the customs, internal revenue, consular, and civil services, and possibly other activities.

Years before the depression that began in 1929 made the problem acute, Elihu Root, one of our wisest, delivering the presidential address to the American Bar Association, recognized the imperative and the inevitable. After summarizing the agencies at work in the United States in the twentieth century, he went on to say: "Before these agencies the old doctrine prohibiting the delegation of legislative powers has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on, we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights, and obstacles to wrongdoing, which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."

If the increase in the complexity of social relations calls for more delegation of legislative powers, if the circumstances of a

great depression make such delegation exigent, should there be no limit? More timely, is there now no limit? Are we who believe there should and must be more delegation, consistent in our criticism of much that has been done in this particular since Franklin D. Roosevelt became President? Most assuredly. Our complaint is that delegations have gone beyond constitutional authority. While there is a twilight zone within which jurists dispute, yet as there are delegations beyond question, so there are delegations manifestly beyond constitutional power. Chief Justice Hughes said in the "Hot Oil" cases<sup>1</sup> that in every case in which the question has been raised, the Supreme Court has recognized there are limits of delegation which there is no constitutional authority to transcend. We who demur believe those limits were passed when Congress delegated to the President, the President delegated to subordinate officials, and they in turn delegated to groups of business men, the power to make rules for violation of which a citizen could be fined or sent to jail. Furthermore, we believe the men who wrote the Federal Constitution never dreamed of such a delegation of power as that which took place when Congress, with only the broadest of limitations, entrusted to one man, the President, expenditure of nearly five billion dollars. We believe that Congress had no right to authorize the President to alter the weight of the gold dollar, involving a duty that through nearly a century and a half had been supposed to be that of Congress itself, a duty more importantly affecting the economic life of the country than any other, a duty involving issues upon which one presidential campaign had been fought, a duty specifically imposed upon Congress itself by the words of the Constitution.

No question is to be here raised of the wisdom of these things in themselves or of the course of the President in exercising the authority entrusted to him. The charge here is that the delegations went beyond the spirit of our frame of government. The courts will determine if they went beyond its letter. Our fathers meant to protect our people from arbitrary one-man power. They meant to have representatives of the people in Congress assembled determine all matters of public policy. Under the Constitution they framed to these ends, our country has been well governed. Its institutions merit our respect. Its Constitution deserves our observance.

<sup>1</sup> Cited *supra*

## CHAPTER XVIII

### SPECIAL LEGISLATION

IF IT were permitted to speak lightly of serious things, one would be tempted to ask in imitation of an ancient conundrum — "When is a law not a law?" There would be more truth than jest in the answer — "When it is private, local, or special "

Those who define a law as a rule of conduct, will find it hard to reconcile their definition with the fact that more than half the measures enacted by the lawmaking bodies of the United States are not rules at all, but exceptions to rules. The paradox can be escaped only by arguing that a rule may be a mandate for either general or individual observance, which is true enough, but not the conception that first comes to mind when we think of laws

This distinction between rules and exceptions to rules is no mere matter of casuistry, interesting only to quibblers. It has become of grave practical importance. In Parliament it divides the work into two classes handled by quite different methods. In this country it has led to constitutional provisions that have brought innumerable contentions to the courts, unending perplexities to legislatures, have wrought much hardship and little good, but at least possess the merit of gropings toward solving a problem of great consequence to the common welfare. It is worth while to study this problem with some care.

At the outset embarrassment and uncertainties come because of the inadequacy of language. Differences of definition threaten unity of understanding, and in part these exist because of the lack of proper words. For instance, Blackstone defines a "general or public act" as "a universal rule that regards the whole country"; and says that "special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns." Note that he seems to treat "general" and "public" as synonymous, "special" and "private" as synonymous. Yet in each case usage frequently discriminates. Since his time the tendency in England has been to drop "general" and "special" in the description of laws, with the result that the word "private" is applied to many bills not

private at all, in the ordinary acceptance of the word. May showed the inaccuracy of the term when he defined a private bill as one that is for the particular interest or benefit of some person or persons, whether an individual or a number of individuals, a public company or corporation, a parish, city, county, or other locality having not a legal but a popular name only. This was an improvement on Blackstone, yet is open to criticism because it does not reach exceptions to general rules that are distinctly not to the interest or benefit of all the persons concerned, but quite the contrary.

Ilbert met this difficulty by ignoring the question of benefit and harm when he said "The object of a private bill is, not to alter the general law of the country, but to alter the law relating to some particular locality, or to confer rights on or relieve from liability some particular person or persons."<sup>1</sup>

This was happier than his phrasing in "Legislative Methods" where he averred (p. 28) that "a public bill is introduced as a measure of public policy in which the whole community is interested," and "a private bill is a measure for the interest of some person or class of persons." Such definitions appear to assume that laws may be properly made which benefit individuals regardless of whether they benefit or hurt the community as a whole. The assumption that many laws are in fact thus made, lies at the root of some of the most harmful thinking of the time. It has given to the phrase "special legislation" an implication that rouses unreasoning wrath, and brings undeserved odium on many an effort of great value to the community. Of course the right conception of law does not recognize as justifiable any statute that does not somehow, even though to but minute degree advance the general welfare, and were there no such justification, few if any so-called private laws ought ever to be enacted.

Because a law directly affects but a few persons, perhaps only one person, the designation "private" seems not wholly inappropriate and hence the attempt to make its use a matter of numbers. The trouble with this is that a law affecting apparently only one individual may by establishing a new policy become of the broadest public concern, on the other hand a law seeming to apply to everybody may find very few persons so situated as to be affected by it measurably.

<sup>1</sup> C P Ilbert, *Parliament*, 85

Still more inaccurate is the terminology if the differentiation is made geographically. There is nothing private about the affairs of a county, a city, or any other locality. It is absurd to call laws relating to a fraction "private" merely because laws relating to the whole are "public." Yet if a usage serves its purpose, the fact that it is absurd is of little consequence, and nothing is to be gained by ridiculing the ordinary speech of England in which bills of the local class are spoken of as "private." Officially there is more precision, for in the yearly editions of the Statutes, division is made into Public General Acts, Public Acts of a Local Character, Local Acts, and Private Acts.

With us the confusion of terms has taken a different direction. We have used "private" and "special" indiscriminately, with "local" as a sort of explanatory sub-title. Were it possible to ordain the use of language (which it is not), a benevolent despot might well try to secure that general-special (or general-local) be determined by territorial extent, public-private, by subject matter. Lacking acceptance of such a classification, Americans may go on thinking that their use of "special" is better than the English "private" to cover everything not "general"; and may justify their tendency to use "public" for laws applying indiscriminately to all the members of a community.

Congress, however, has borrowed the English word. The United States Statutes say that "the term 'private bill' shall be construed to mean all bills for the relief of private parties, bills granting pensions, bills removing political disabilities, and bills for the survey of rivers and harbors."<sup>1</sup> By Congressional practice a bill general in its enactments, though for the benefit of an individual or a corporation, is not a private bill. To be a private bill, it must not be general in its enactments, but must show on its face that it is for the particular interest or benefit of a person or persons. A pension bill for the relief of a soldier's widow is a private bill, but a bill granting pensions to such persons as a class, instead of as individuals, is a public bill. Yet a bill pensioning a battalion of volunteers has been held to be a private bill. For further illustration of the hair-splitting the subject produces, take the fact that bills for the payment of money to counties or cities are held to be private, while like bills for the benefit of States or Territories are held to be public.

The Supreme Courts have contributed to the confusion. In

<sup>1</sup> *U. S. Code*, p. 1428, sec. 189

*Unity v. Burrage* (103 U S 447, 1880) an act validating elections by the people of Macon County, Ill, on issuing bonds of the county in aid of certain railroad companies, was held to be a public act. In *State ex rel Cothren v McLean* (9 Wis. 279, 1859) it was held that a law providing for the location of a county seat is a general law.

"In this country," said the United States court, "the disposition has been on the whole to enlarge the limits of this class of public acts, and to bring within it all enactments of a general character, or which in any way affect the community at large." But is it easy to imagine any measure whatever that a Legislature might properly enact, which would not "in any way affect the community at large?"

Decisions are on more solid ground when they emphasize "class" as the test. Thus take three Pennsylvania expressions: "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special" <sup>1</sup> "A law which does not exclude any one from a class, and applies to all the members of the class equally, is general" <sup>2</sup> "The converse is also true that a law which does permanently exclude any one from the class must be special" <sup>3</sup> Yet while in Pennsylvania it is held that there must be one system of government for all cities of the same class, in New Jersey there may be many systems as to one or many particulars, and each city may choose the system it prefers, though in both States the restrictions are practically the same.

These perplexities are not cited in the hope of aiding the reader to any clear conclusion, for that can hardly be asked where courts and Legislatures differ so widely. The chief purpose here is to show one of the defects inevitable in all attempts to delimit various kinds of enactments. If, however, anybody seeks a working hypothesis that shall approach general acceptance, he cannot do better than take the definitions reached in summary by a specialist who wrote a book on the matter, citing and studying innumerable cases. "It may be said in brief," concludes C. C. Binney, "that: — (1) A general law is one which applies to and operates uniformly upon all members of any class of persons, places, or things, requiring legislation peculiar to

<sup>1</sup> *Wheeler v Phila*, 77 Pa 338 (1875).

<sup>2</sup> *Lloyd v Smith*, 176 Pa 213 (1896)

<sup>3</sup> *Blankenburg v Black*, 200 Pa 629 (1901).

itself in the matter covered by the law. (2) A special law is one which relates either to particular persons, places, or things, or to persons, places, or things which, though not particularized, are separated, by any method of selection, from the whole class to which the law might, but for such limitation, be applicable (3) A local law is one whose operation is confined within territorial limits other than those of the whole State or any properly constituted class of localities therein " <sup>1</sup>

With this may usefully be coupled a clarifying illustration by Professor Reinsch. "A law prescribing certain safeguards to be observed by physicians in surgical operations would be a general statute," he says, because "it deals with all persons who may undertake such operations, or if looked upon as applying to surgeons only, it applies to them as a class engaged in some particular profession. On the other hand, an act is local or special when it applies only to a specific locality, or to a group of persons, who do not really form a separate class as far as the subject matter of the special law in question is concerned. An act exempting all physicians from the payment of taxes would be considered a special act, because though they are distinguished from other citizens in matters of their profession, this distinction has no bearing upon the general duty of paying taxes." <sup>2</sup>

Only two of our States have put clear definition into a Constitution. New York in 1894, after creating three classes of cities by population, went on to say "Laws relating to the property, affairs of government of cities, and the several departments thereof, are divided into general and special city laws, general city laws are those which relate to all the cities of one or more classes, special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section."

Alabama in 1901 defined as follows "A general law within the meaning of this article is a law which applies to the whole State; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole; a special or private law within the meaning of this article is one which applies to an individual, association, or corporation."

The practical importance of the distinctions that have been attempted has been long in developing. Indeed it goes back to

<sup>1</sup> *Restrictions Upon Local and Special Legislation in the U S*, 25.

<sup>2</sup> *American Legislatures*, 148

the very origins of Parliament, when the redress of grievances was made the condition upon which the agents of the counties and boroughs granted money to the King. In those days he was the only source of privilege, and until the courts worked out their scope, he was the frequent source of justice. The petitions presented in the Parliaments of Edward I, the earliest corresponding to the Parliament of to-day, were practically all what would now in England be called private bills. Of the five hundred presented at the Parliament of 1305, only five dealt with matters of public concern, and three of these affected feudal tenants-in-chief alone. The great mass consisted of individual requests for royal favor, or for legal relief, or for redress of private wrongs, and they called for no common action among the petitioners.<sup>1</sup>

It was long the case that if a man could not enforce his rights in the courts of Common Law, he had to petition somebody for redress. He may have turned to the Crown, or the Crown in Chancery, or the Crown in Council. Sometimes he addressed the King, Lords, and Commons, sometimes the Lords and Commons. Anson says the petitions from which private bill legislation takes its origin were those that it became the practice in the reign of Henry IV to address to Parliament, or to the Lords, or to the Commons.<sup>2</sup>

Hallam traces the source a little differently. He thinks it was in the first years of Henry V that the Commons began to exert themselves with the petitions of individuals to the Lords or Council. "Many of the requests," he says, "were such as could not be granted without transcending the boundaries of law. A just inquietude as to the encroachments of the King's Council had long been manifested by the Commons, and finding remonstrances ineffectual, they took measures for preventing such usurpations of legislative power by introducing their own consent to private petitions. These were now presented by the hands of the Commons, and in very many instances passed in the form of statutes with the express assent of all parts of the legislature. Such was the origin of private bills, which occupy the greater part of the rolls in Henry V's and Henry VI's Parliament."<sup>3</sup>

<sup>1</sup> A. F. Pollard, *The Evolution of Parliament*, 117.

<sup>2</sup> Sir W. R. Anson, *Law and Custom of the Constitution*, I, 262.

<sup>3</sup> *Middle Ages*, pt. III, ch. VIII.



Part of the grievances for which redress was thus sought, rose from inequitable dealings between man and man, others sprang from the administrative operations of government. Presently the development of the chancery tribunals took care of most of the cases of equity between individuals. Under the Stuarts it became clear that Parliament did not furnish the best resource for correcting the minor defects of administration, and these too were turned over to the courts or met by better local organization. This left to Parliament only the grievances of an extraordinary character, for which the natural remedy was something more like a genuine law than like what had been in essence a judgment. At the same time there came more and more requests for special privileges, not shared by the whole nation. Up to the end of the 18th century the topics were chiefly personal, such as divorce, naturalization, and the like. Half a century later they had become in the main local or parochial. Now they are for the most part of wide importance, concerning the quasi-public affairs that are the characteristic of the time.

From the outset the class of bills that thus grew, was technically discriminated by the form of the King's assent. In the case of a public bill, his approval was given by the phrase — "*Le Roi le veult*", but to a private bill he replied — "*Soit fait comme il est désiré*". No distinction was made in the Statute Book until 1798, but since that time local and personal Acts have not appeared in full therein. Their titles are earmarked with Roman numerals, the Arabic numbers being used for Public Acts. The need of distinguishing is of importance in legal proceedings, for the courts are bound to take judicial cognizance of Public Acts, but not of Private Acts unless they are formally stated in the pleadings. Formerly this often brought in issue whether an Act was Public or Private, but the difficulty of determining was ended by the passage in 1850 of Lord Brougham's Act, providing that all Acts are to be deemed public unless they contain an express declaration to the contrary. Since then the distinction has been chiefly of consequence by reason of the difference in the parliamentary handling of Public and Private Bills.

#### IN COLONIAL AMERICA

In the assemblies of colonial America no sharp line was drawn between public and private bills. They were printed indiscriminately in the statute book, and indeed it was not uncom-

mon for part of a statute to be general and part special. The colonists must have known of the technical difference long familiar in England as attested by the two ways of giving the King's assent. They were, however, working at the start under the conditions of trading companies, and most of their early laws were little more than rules and regulations — were ordinances rather than statutes. Yet here and there may be found attempts to discriminate. Very early in Massachusetts Bay it was ordered (March 12, 1637-38) that "at every Generall Court (the Court being called) there shalbee a committe first chosen out to hear & determine of all particuler petitions & suites, & of other private business, unless the committe so chosen shall see it meete to bring the cause to the whole Courte." <sup>1</sup>

Notice that this committee was to determine the matter unless it saw fit to report to the full Court. Knowledge of what happened under such a plan would be of as much value as interest, but we must content ourselves with the inference that the plan was found unworkable, for no trace of it appears in our institutions to-day. Undoubtedly most of the matters involved were appropriate for judicial proceedings and came soon to be adequately cared for by the trial courts that developed.

The colonial assembly, however, long continued to be the court to grant relief when the ordinary tribunals were without jurisdiction. If a petition for such relief was presented, a writ served by the sheriff summoned the adverse parties to the capital on a given day of the session, and the forms of ordinary litigation were further followed by taxing the costs against the losing party, and collecting them on execution. A Connecticut statute says, referring back to legislative action on the subject in 1698, 1715, 1833, and 1849. "Every petition to the general assembly of an adversary nature shall be accompanied with a citation to the adverse party to appear on the second day of the session, and be returned to the secretary on or before the first day of said session. No other petition for action affecting private interests only shall be heard, unless returned to the secretary and docketed by him by the eighth day of the session."

By the early part of the 18th century, the volume of private legislation had become so considerable as to seem to the home government a matter calling for strict regulation. Many of the measures affected legal rights that ought to be safeguarded.

<sup>1</sup> *Records of the Colony of the Massachusetts Bay in New England*, 1, 223

Persons mentioned in the bills needed no special protection, but the Board of Trade found it necessary to insist that every bill of this class should contain a "saving clause" protecting the rights of all persons not mentioned in the acts, as well as those of the Crown. In 1719 the Board went so far as to propose that no private act passed in America should be in force until it had been confirmed by His Majesty. Provision also was made for proper publicity in such proceedings. Here, for instance, are the instructions to Governor William Tryon of New York in 1771: "It is likewise our will and pleasure that you do not give your assent to any private act until proof be made before you in council and entered in the council books that public notification thereof was made of the party's intention to apply for such Act in the several parish churches where the premises in question lie for three Sundays at least successively before any such act shall be brought into the Assembly, and that a certificate under your hand be transmitted with and annexed to every such private act, signifying that the same has passed through all the forms above mentioned."

#### GROWTH OF EVILS

The failure to develop in the colonial period any general system for the treatment of special, local, and private legislation, particularly local legislation, permitted the growth of evils that became serious after the organization of the States, and ever since have vexed all American legislatures, being indeed among the prime causes for such inefficiency as they disclose.

The first of these evils to become conspicuous was that of distorting the conception of a legislator's duty, leading him to think the advancement of local interests his chief concern. When the adoption of the Federal Constitution was pending, Madison said in "The Federalist" (No. 46): "Everyone knows that a great proportion of the errors committed by the State legislatures proceeds from a disposition to sacrifice the comprehensive and permanent interest of the State to the particular and separate views of the counties or districts in which they reside." A generation later we find a delegate to the Convention that framed the Constitution of Maine, Ezekiel Williams of Portland, describing the evil graphically when speaking of the Massachusetts Legislature, in which Maine had shared for

scores of years. "The members being paid by their respective towns," he said, "and being but scantily paid, consult their own convenience — attend when they can as well as not; and no longer than their towns are willing to pay them. Hence the towns and their Representatives are habituated to consider it no part of their duty to attend to anything like general legislation. The Representative is expected to attend as a kind of agent for the town, to effect local objects altogether. Hence it has happened that the wealthy towns, that are able and willing to support their Representatives the whole term, have exercised the whole power of general legislation."

Seventy-five years and more afterward, Francis C. Lowell in discussing the "Legislative Shortcomings of the Massachusetts General Court,"<sup>1</sup> found the local anxieties of the legislator still uppermost, for he placed as first of the two objects the individual member generally has in view, the securing of the passage, or more rarely the defeat, of some legislative measure of only local importance — a measure in which his constituents or friends may be deeply concerned, though it is of very slight importance to the Commonwealth at large. "Occasionally, but not often, this measure is an iniquitous job. Usually the member has no pecuniary interest in it, and often it is little more than a matter of legislative routine. Even when it is unwise, it is frequently nothing worse than a piece of foolish legislative fussiness, or perhaps it was devised to meet some local demand, and is objectionable only because of the bad precedent it establishes. The second object which the average member of the Legislature proposes to himself is a fair and impartial vote upon the measures submitted to him."

The criticism is not peculiar to Massachusetts. It extends to every State in the Union. Bryce's conclusion as to the American legislator is that "his first and main duty is to get the most he can for his constituency out of the State treasury, or by means of State legislation. No appeal to the general interests would have weight with him against the interests of that spot."

Two eminent citizens of New York have in our time brought to the same accusation a wealth of experience and a depth of sagacity that demands and secures for their words the greatest respect. In his second message to the New York Legislature, January, 1884, Grover Cleveland, then Governor, attacking

<sup>1</sup> *Atlantic Monthly*, March, 1897

special legislation as an evil having a most pernicious effect in legislation, declared that every consideration of expediency, as well as the language and evident intent of the Constitution, dictated the exclusion of such matters from legislative consideration. "In many cases," he averred, "no better excuse exists for the presentation of such bills than the dignity and force which are supposed to be gained for their objects by legal enactment, the saving of expense and trouble to those interested in their purposes, and the local notoriety and popularity sought by the legislators having them in charge."

Seven years later, with experience ripened by his observations as President, Mr. Cleveland renewed the attack in a speech to the Commercial Club of Providence. "The people have a right to claim from their representatives their best care and attention to the great subjects of legislation in which the entire country is interested. This is denied them if their representatives take their seats burdened with private bills, in which their immediate neighbors are exclusively interested, and which they feel they must be diligent in advancing, if they would secure their continuance in public life. They are thus led by the exigencies of the situation as they view it, not only to the support of private bills of questionable propriety, but to a neglect of a study and understanding of the important questions involved in general legislation."<sup>1</sup>

Ehhu Root was yet more caustic in his valedictory address to the New York Constitutional Convention of 1915. "We found that the Legislature of the State had declined in public esteem, and that the majority of members of the Legislature were occupying themselves chiefly in the promotion of private and local bills, of special interests, with which they came to Albany, private and local interests upon which apparently their re-elections to their positions depended, and which made them cowards and demoralized the whole body."<sup>2</sup>

It is true that special bills make cowards of some men, perhaps of many men. My own observation, however, inclines me to think that dereliction of duty in this regard is usually due to misconception of duty. It is within bounds to say that the greater part of American legislators honestly think their first obligation is to their constituents. They view themselves

<sup>1</sup> *Writings and Speeches of Grover Cleveland*, 175.

<sup>2</sup> New York Constitutional Convention of 1915, *Record*, 4458.

precisely in the actual character of the earliest Representatives both in England and America — as agents delegated to speak for those who send them, with the interests of their principals uppermost. The cowardice is that of the smaller number who are conscious that this is the wrong conception and dare not risk their chance of further usefulness by living up to what in their hearts they know to be the right rule of action. When you realize that every man who puts foremost the common welfare of State and Nation, and yet survives in American public life, is a man who has miraculously escaped ruin at the hands of the people, you may have more charity for those who now and then stumble. The cry, "He never got anything for us," has been the death knell of many a promising career. When not long ago a candidate for Congress from a certain New England district ousted a veteran legislator by charging him with being a supporter of "pork-barrel" legislation, it was deemed a political phenomenon of the first magnitude, a seven-days wonder. Whether it was an accident, or really an omen of happier politics no man can say. Only of the past are we sure, and there can be no dispute that the record of the past tells us the American people have hitherto approved and supported chiefly those men who have thought the advantage of communities more important than that of State or Nation. The blame for the evil that has followed rests on the people more than on the men who have said and done what the people wanted.

Nevertheless the thoughtful man knows that the people often want things they would not want if they were rightly informed as to the balance of gain and loss. To that end let other evils of special legislation be set forth.

Turn again to Cleveland's inaugural address. The consideration of local bills, he charged, "retards the business of the session and occupies time which should be devoted to better purposes." Another Governor, William B. Washburn of Massachusetts, said in his inaugural message January 8, 1874: "Much and just complaint is made at the length of our legislative sessions. If we could have more general and less special legislation, . . . it seems to me there would be a fair prospect of bringing your labors to a close within a reasonable time." Still another Massachusetts Governor, Alvan T. Fuller, vetoing in 1926,<sup>1</sup> laid the emphasis on cost, saying, "I do not think the citizens of Massa-

<sup>1</sup> House Doc 1335

chusetts are going to continue to sit idly by and without protest watch this ever encroaching special legislation place burdens upon them, compelling many citizens to contribute towards the levy required for special legislation, who, from a financial standpoint, are much less able to contribute than those who receive it.... Every public servant must ask himself as to what right he possesses to pass legislation which will take from all the people their money and give it to a favored few or to a special group"

It is needless to quote all the other Governors and other public men who have said substantially the same things. Instead of duplicating opinions, let us observe facts

G A Alger, writing on "Executive Aggression," in the "Atlantic Monthly" for November, 1908, said that in England in the entire nineteenth century there were enacted some twenty-one thousand special and local bills. Of 25,466 acts and 1,576 resolutions passed by Congress and by State Legislatures in the biennial period 1906-07, he estimated that twenty thousand were local laws, affecting separate cities and towns and having no general scope whatever, or were special bills relating to private interests only. In 1907, substantially the entire lawmaking work of Parliament itself was embodied in fifty-six general public acts, contained in 293 printed pages. In the same year, the State of New York enacted 754 laws, occupying twenty-five hundred pages.

Another computer, Professor Dealey, makes the proportion of special bills somewhat smaller, putting it at seven tenths, or for the five years before he wrote his book on "Our State Constitutions," possibly three fifths. In Massachusetts in the eight sessions from 1910 to 1917 inclusive an average of 308 special acts, 306 general laws, 151 resolves, and 121 appropriation bills were passed each year. Since many of the resolves and some of the appropriations were special in nature, the figures probably harmonize with Professor Dealey's estimate. President Gaspar G Bacon told the Senate in his address at the opening of the session of 1930 that of the 443 acts and resolves passed in the preceding session, 212 were of either individual or local application. He suggested several legislative changes that would reduce substantially the annual grist of special bills.

In Congress the proportion of private or local bills is much greater than in the legislatures. In a typical three weeks period

after the opening of a session (1916) the record of bills introduced was:

	Senate House.	
Private, or local, bills —		
Pensions . . . . .	396	1,207
Local improvements . . . . .	22	94
Claims . . . . .	34	103
Changing military records . . . . .	5	17
Miscellaneous local bills . . . . .	45	102
Public, or national, bills . . . . .	54	144
	556	1,667

The public bills enacted amounted to only nine per cent of the total number introduced, 91 per cent were concerned with strictly private or local matters<sup>1</sup> The five Congresses from 1923 to 1933 inclusive enacted an average of 449 private bills each.

It is true that these figures do not accurately describe the proportion of time really spent on special legislation. In Congress far more time is given to a dozen or more of big appropriation bills than to all the private bills put together. Yet even in Washington the private bills do take a great deal of valuable time, and in the State Legislatures it is not impossible that they get attention in proportion to their number. When Gaspar G. Bacon was president of the Massachusetts Senate he said that "at least one half of the time of the Legislature is consumed with bills relating entirely to problems with which most of its members are not in the least interested and to which they pay little attention"<sup>2</sup>

Perhaps valid inference can be drawn from comparisons of size. Recent statute books of Connecticut, Florida, North Carolina, Tennessee, and Texas show that their special acts require on the average about three times as many pages as the general acts. I am confident that were all special legislation taken out of the Massachusetts General Court, eight or ten committees, some of them overburdened, could be wholly dispensed with, and others greatly relieved. Possibly the session could be cut in two, certainly it could be shortened by six weeks or two months, for on the average it lasts through nearly half the

<sup>1</sup> *The New Republic*, January 6, 1917

<sup>2</sup> *United States Daily*, March 18, 1931.



year. In the many States with short sessions the relief would result in better work on the general laws. Everywhere a great load, mostly needless and often worse, would be removed.

The importance of such a result can hardly be over-estimated. The ever-growing complexity of our social conditions puts an ever-growing strain on our legislative processes. They approach the breaking-point. Our troubles are not due to the fact that we make too many laws, but that there are too many laws to be made. With Congress besieged at every session by more than twenty thousand petitioners, with a Legislature of such a State as Massachusetts besieged by more than two thousand, with the number ever-growing as industry specializes, as the domain of commerce expands, as progress increases the desire and capacity for co-operative expenditure to the common advantage, something must be done to adapt to new conditions lawmaking processes that were quite adequate to the simple needs of an agricultural community, but do not suffice the needs of the intricate life of today.

The great volume of special legislation not only clogs the machinery of lawmaking, but also encumbers the statute-books. Worse, it steadily adds to the confusion of the laws. Even eighty years ago this evil had become apparent. A Committee on Retrenchment and Reform set it forth to the Massachusetts Senate in 1857. "No man," said the report, "knows what his rights are, much less what they may be. The courts are crowded with cases arising out of the conflict of discordant statutes. Heavy drafts are made upon the time and patience of judges in the endeavor to give harmony and legal effect to these annual shoals of enactments which find their way into the statute book. The old and well-established principles of the common law become less a matter of study and of application to the cases ever arising from new inventions in the arts and new modes of industry. The law is degraded from its high place as a broad and noble science, to that of a mere system of hermeneutics — and the people, by their very freedom in matters of legislation, deprive themselves of the great immunity, so wisely guaranteed by the Bill of Rights, that of being governed by standing laws."

The harmful effect on general laws, long familiar, has been supplemented of late by corresponding damage to administrative law. Within a generation or two we have built up a huge and complex system of public administration, concerned with

many kinds of activities meant for the public welfare. These we are entrusting for the most part to experts and specialists, either chosen as such or made such by experience. Special legislation is continually interfering with their programs and policies. The Joint Special Committee on Legislative Procedure that reported to the Massachusetts General Court in 1915, dwelt on this. For illustration it referred to ten special acts of the year before affecting the State Highway system. "These," said the Committee, "were placed on our statute books without careful consideration as to the desirability or merits, and recommended by a committee less fitted to pass judgment than the commission created for the purpose and handling such questions continually. They are often contradictory to, interfere with, and generally upset, some part of the general systematic plan of the commission relative thereto, as for example, the building of certain through trunk lines between our sister States in the first instance, and, next in order, the building of secondary trunk lines and certain connecting links between thickly settled places on the main thoroughfares. Remembering this general scheme, and taking into consideration the welfare of the whole State, simply shows the absurdity of some of these special acts. For example, chapters 78, 502, 773, and 779 of the Acts of the year 1914 are secondary routes which would doubtless have been constructed by the commission at some time, but which should wait for the completion of at least one through route first. It would seem as though, with an expenditure of over \$2,000,000, that the State Legislature might be spared the necessity of considering nearly forty separate propositions and imposing an additional hundred thousand dollars upon the State tax by the adoption of ten or a dozen of them."<sup>1</sup>

It is also to be charged against special legislation that it is a lamentably expensive way of handling matters. The annual cost of the legislative department in Massachusetts is in excess of \$400,000. Something more than two thousand measures are introduced each year, so that if averages may fairly be taken, each one entails expense of two hundred dollars or so. On the basis of those that become law, the cost is more than twice as much. Of course this is not a wholly fair suggestion. A Legislature has what a business man would call overhead charges that must be borne no matter what the volume of business.

<sup>1</sup> House Doc 280, of 1915

Yet it is clear that cost increases with volume, even if not in the same ratio. It is also clear that a great many of these matters could be handled at far less cost if they went where they belong — to the courts or to administrative agencies.

There remains to be censured what Grover Cleveland thought the worst result following in the train of special bills. Said he in the inaugural address that has been quoted. "Such measures, there are grounds to suspect, are frequently made the means of securing, by a promise to aid in their passage, the votes of those who introduce them, in favor of other and more vicious legislation." And he repeated the accusation in his Providence speech: "The importance of a successful championship of these private bills, measured by a standard which ought not for a moment to be recognized, seems so vital to those having them in charge that they are easily led to barter their votes for measures as bad as theirs or worse, in order to secure the support of similarly situated colleagues. Thus is inaugurated a system called log-rolling, which comes frightfully near actual legislative corruption; and thus the people at large lose not only the attention to their affairs which is due to them, but are often no better than robbed of the money in the public treasury."<sup>1</sup>

Little is to be added to this indictment. It need only be pointed out that nearly all lobbying is due to special bills. They bring to the State Houses numbers of men whose influence hurts, as well as numbers of other men, sincere and disinterested, who in doing a public service are compelled to tax the time and strength of lawmakers. As the prolific source of bribery and corruption, special bills have done more than any other one thing to bring American legislatures into disrepute. Tacitus, writing of the later days of the Roman republic, tells us (*Annals*, III, 27): "And now laws were not made for the public only, but for particular men, and in the most corrupt period of the Commonwealth the greatest number of laws were made." Whether special legislation was then or is now cause or result, or merely symptom, may be argued, but nobody can question that against it the public needs defense.

Representative W. M. Springer of Illinois, long active in the work of Congress, thought the harm so important and the danger so serious that from 1876 to 1890 he urged the adoption of an amendment to the Constitution that would effectually

<sup>1</sup> *Writings and Speeches of Grover Cleveland*, 175

prohibit the passage of special legislation<sup>1</sup> He would have forbidden the granting of pensions, land, or prize money, relief to any person, payment of claims against the United States, except to pay the judgments of courts or commissions; and granting to any corporation any special or exclusive privilege, subsidy, immunity, or franchise. He wished Congress to be limited in its legislative power to the "enactment of laws general in their application and effect to all sections and persons within the jurisdiction of this Constitution " Nine times he introduced a resolution to that end, but without result

He went far beyond what political opinion would yet support, but fortunately it is moving in that direction The tendency is to provide more and more by change of Constitution or of legislative rule that no special law shall be enacted where a general law would be practicable. However reluctantly, legislators are little by little turning petty decisions over to administrative agencies. Cities are more and more entrusted to govern themselves. There is gain, though it is too slow

<sup>1</sup> *Proposed Amendments to the Constitution*, M A Musmanno, 149, 150.

## CHAPTER XIX

### RESTRAINING LEGISLATURES

THE statesmen who wrote our earliest Constitutions had no glimpse of the particular evils in special legislation as we have come to know them. Their only fear was of privilege, and against this the only precaution they took was in the form of a declaration in some of their Bills of Rights. Virginia set the example by saying in 1776: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." A few months later North Carolina copied this, and in one form or another it has been put in the Constitutions of half the States. It has proved to be a vague generality, of little practical importance. Its most promising amplification has been that of Tennessee, which said in 1834: "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law."

The original Constitutions gave the Legislatures almost a free hand. In the conflicts with the colonial Governors, popular sympathy had been wholly with the Legislatures and when it came to the framing of Constitutions, the people were in no mood to fear harm from their champions. Typical of their confidence was the grant to the Legislature of Massachusetts: "Full power and authority are hereby given and granted to the said general court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without."

Soon, in the face of abstract pronouncements against special privilege, Legislatures began to invite its troubles. Inevitably the first remedy to suggest itself was that of taking away from the Legislature power to pass mischief-making laws. Georgia

seems to have been the first State to apply this remedy. In 1789 it ordained, "The Legislature shall have no power to change names, nor to Legitimate persons, nor to make or change Precincts, nor to establish Bridges or Ferries, but shall, by law, prescribe the manner in which said powers shall be exercised by the Superior or Inferior courts, and the privileges to be enjoyed "

Observe that this was not only an invasion of what had been thought the prerogative of the legislative branch of government, but also it was a transfer of what are really administrative functions, not to the executive, but to the judicial branch. The courts have always resented being burdened with such duties, and in spite of the Georgia example, their wishes have for the most part been heeded. Barring some duties in connection with elections and a few other administrative functions, not much extraneous matter has been inflicted on them by the Constitution-makers. The only important provision in conflict with this that comes to my notice is one made by Tennessee in 1834 "The Legislature shall have the right to vest such powers in the courts of justice, with regard to private rights and local affairs, as may be deemed expedient." Fortunately no extensive share in local affairs has disturbed the normal course of judicial procedure anywhere in the land.

On the other hand several of the States have killed two birds with one stone by specific directions that the legislative branch shall not handle matters that the courts can legitimately handle. Virginia in 1850, was followed by West Virginia, Pennsylvania, Kentucky, Mississippi, and Alabama, in explicitly declaring that no law should be passed granting powers or privileges in any case where the courts have jurisdiction to grant them or to give desired relief.

Such a provision would not be made were it not for the twilight zone between what is clearly a legislative and what a judicial function. The legitimating of children, covered by the Georgia provision of 1798, lies in this zone, and with not quite so much reason the changing of names has often been put there.

It did not become the custom to imitate Georgia in definitely and directly turning these things over to the judiciary by constitutional provision. For instance, in 1835 North Carolina said the General Assembly should not have power "to pass any private law to alter the name of any person, or to legitimate

any persons not born in lawful wedlock, or to restore to the rights of citizenship any person convicted of an infamous crime"; but might pass general laws regulating these things. Two thirds of the States have made provisions of this class.

Of a kindred nature is the problem of divorce. Georgia also took the lead in its treatment, in 1789, by saying "Divorces shall not be granted by the Legislature until the parties have had a fair trial before the superior court, and a verdict shall have been obtained authorizing a divorce upon legal principles. And in such cases two thirds of each branch of the Legislature may pass acts of divorce accordingly." The share of the Legislature disappeared when in 1833 it was declared that divorces should be final after concurrent verdicts of two special juries, authorizing a divorce upon legal principles. Mississippi from 1817 to 1832 and Alabama from 1819 to 1865 likewise required ratification by a two-thirds vote of both branches of the Legislature. Tennessee in 1834 appears to have been the first to prohibit legislative divorce absolutely, followed in the next year by North Carolina and Michigan, with Arkansas the year after. In 1838 Pennsylvania went most of the distance by forbidding the Legislature to decree divorce in any case where the courts were or thereafter might be empowered by law to act. The whole matter was turned over to its courts in 1873. New Jersey took it all away from the Legislature in 1844, followed by Louisiana and Texas the next year, New York and Iowa the year after, and then in quick succession within five years, by Wisconsin, Illinois, California, Virginia, Kentucky, Ohio, and Indiana. Others have accepted the policy until now more than three quarters of the States by constitutional provision forbid legislative action, besides South Carolina which prohibits divorce altogether.

Still another problem of this same general class was met by New Jersey in 1844 when it said that "no private or special law shall be passed authorizing the sale of any lands belonging in whole or in part to a minor or minors, or other persons who may at the time be under any legal disabilities to act for themselves." Virginia and Kentucky copied this, acting in 1850. Other States have forbidden the Legislature to concern itself with land sales.

In more than half the States the Legislature shall not change the venue in any criminal or legal prosecution, but shall provide for it by general laws.

In these matters now almost wholly turned over to the courts either by constitutional provisions or by statutes, a mixture of motives has brought about the change. In part it has been due to the inherent and notorious incapacity of lawmaking assemblies for the dispensing of justice, in part to the pernicious effects on the Legislatures themselves. In a body where decisions may be the granting of favors rather than the determination of rights, more or less of scandal inevitably follows. It is fortunate that our Legislatures awoke to this and rid themselves of the dangers in those instances where they were not coerced to it by the action of Constitutional Conventions.

The element of scandal had much to do with a quite different set of reforms, those concerned with the relations between Legislatures and the world of business. The transformation of society traceable chiefly to the invention of the steam engine had for one of its features the development of the corporation idea in the way of application to manufacturing and transportation. It was a century or more ago that the effect on legislative bodies began to be felt and that men turned to the Constitutions for protection. In the New York Convention of 1821 a motion looking to incorporation by general law did not prevail. It was perhaps the first skirmish in a campaign for reform that had to be fought slowly and painfully and sometimes scandalously through all the States of the land.

By 1834 so little progress had been made that the advocates of legislative privilege in Tennessee were able to get the right of granting charters specifically reserved to the Legislature by the Constitution. The financial troubles of the next few years, however, brought public opinion into a different mood, so that a start in the right direction could be made by Pennsylvania, timid enough as now viewed, but very likely then looked on as radical. It was required in 1838 that six months notice of the application for a charter should be given and that no charter should be granted for more than twenty years, the power of revocation to be reserved, and no one law to cover more than one charter. In that same year Florida forbade altogether the incorporation by special act of "churches, and religious or other societies," but it authorized other incorporations by two-thirds vote of each House, with three months' notice in one or more newspapers preceding the session.

Louisiana was in 1845 to make the first real achievement:



"Corporations shall not be created in this State by special laws, except for political or municipal purposes " Then in 1846 came New York, prohibiting incorporation under special act "except for municipal purposes, and in cases where in the judgment of the Legislature, the objects of the corporation cannot be attained under existing laws " Special charters for banking purposes were wholly prohibited In the same year Iowa directed incorporation by general laws only. From that time on, progress was rapid In 1848 Wisconsin ordered general laws for corporations without banking powers or privileges, and Illinois said there might be general laws In 1849 California put the command for general laws into its first Constitution. Michigan acted in 1850, Maryland, Indiana and Ohio in 1851

The subject received much discussion in the Massachusetts Convention of 1853, the outcome being the submission of an innocuous amendment, little more than a declaration of policy, reading, "The Legislature shall not create corporations by special act when the object of the incorporation is attainable by general laws " In the debate Henry Wilson said the preceding Legislature had passed 158 special corporation acts He believed that special legislative questions had in the preceding ten years consumed one third of the time of the Legislature. The amendment was defeated at the polls, 63,246 to 67,011, probably not because of objection to it, but by reason of the general disapproval of the work of the Convention

The Illinois provision of 1848 proved a failure Although it said corporations should not be created by special acts, except for municipal purposes, the mandate was not to apply in cases where, in the judgment of the General Assembly, the objects of the corporation could not be attained under general laws, and the passage of general laws was merely permitted, not ordered. Judge Dillon said of the General Assembly in 1857. "It is probably true that more corporations were created by the Legislature of Illinois at its last session than existed in the whole civilized world at the commencement of the present century " In 1857 the General Assembly enacted 563 special laws Not until 1865 was this number equalled or surpassed In that year it reached 724 From there on it mounted higher and higher, to 1071 in 1867, to 1188 in 1869 Those were years of multifarious and indiscriminate incorporation Success in 1865 and further success in 1867 had "merely whetted the appetites "

of special-privilege hunters. In 1869 — after the people in November, 1868, had voted in favor of a constitutional revision — they “moved on the capitol.” Bills to incorporate appear to have been passed automatically. No scheme, however fantastic, seems to have been proposed in vain.<sup>1</sup> Then the orgy was ended, by the Constitution of 1870, with its absolute prohibition of the creation of corporations by special laws, except those for charitable, educational, penal, or reformatory purposes.

Pennsylvania was just as reckless. In the period before 1873 its Legislature granted hundreds of charters by simply giving to three favored names the powers enumerated in some other Act incorporated merely by reference. It even furnished charters upon condition that no organization should be effected or business done within the confines of the State, and such was the pressure upon its members that it became the habit to prepare laws for the signature of the Governor, which had never passed either branch of the Legislature.<sup>2</sup> The Constitution of 1873 squarely forbade the creation of corporations, or the amending, renewing, or extending of their charters, by special law, and included the incorporation of cities, towns, or villages, or the changing of their charters.

Now incorporation by general laws is the constitutional provision in four fifths of the States, with statutory provisions for general laws elsewhere. Nearly half the States have by their Constitutions forbidden the Legislature to grant any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever.

#### GRANTS AND SALARIES

The era of internal improvements, with the reckless appropriation of public funds and the loaning of credit in aid of all manner of schemes for canals, railroads, and other enterprises, an era culminating with the disastrous panic of 1837, led to throwing more of constitutional protection around State treasuries. New Jersey in 1844 appears to have been foremost in this reform, saying, “The credit of the State shall not be directly or indirectly loaned in any case.” The next year Louisiana said the same thing in more elaborate form. New York copied

<sup>1</sup> *University of Illinois Studies in the Social Sciences*, March, 1917, 76-77.

<sup>2</sup> Samuel Dickson, “President’s Address before the Penn. Bar Assn.,” *Am. Law Register and Review*, August, 1896.

New Jersey in 1846, preferring to enumerate "individual, association, or corporation." Maine followed the example in 1847, Illinois in 1848, California in 1849, Kentucky in 1850, Ohio in 1851, and other States have since prohibited likewise.

The banking troubles of that period led some States to especial care in the matter of bank charters. Pennsylvania put restrictions into her Constitution in 1838. From 1845 to 1868 Texas forbade the creation, renewal, or extension of any corporate body with banking or discounting privileges. From 1846 to 1857, no corporate body could be created in Iowa with the privilege of putting out a circulating medium. In 1857 this was replaced by a provision that no corporation should be created with banking powers except with the ratification of popular vote. From 1846 until after the War Arkansas said no bank or banking institution should be incorporated. From 1848 to 1902 Wisconsin required the referendum on laws creating banks; and since then has required a Yea and Nay vote of two thirds of all members elected for the passage of general banking laws. Ohio in 1851 required acts authorizing associations with banking powers to be submitted to the people. New York in 1846 besides prohibiting special bank charters, forbade laws sanctioning the suspension of specie payments by any person, association, or corporation issuing bank notes of any description. California in 1849 forbade any charter for banking purposes, but permitted the incorporation of banks under general law, though they were not to issue any circulating medium. In 1879 they were permitted to issue "the lawful money of the United States."

In more than half the States it is prescribed that the State shall not become subscriber to the stock of any corporation or joint-stock company.

Financial in subject-matter, though quite outside the limits of legitimate business, is one kind of prohibition due more to scandal without than to scandal within the legislatures — the prohibition against lotteries. It was in 1821 that New York first forbade the Legislature to permit them. Tennessee, in 1834, was the next to recognize their evils in the same manner, followed by Michigan in 1835, and Arkansas in 1836. In the decade 1841–1850 nine other States fell in line, and others have since done the same until now more than three quarters of the States make constitutional provision, others have acted by statute, and the evil became virtually extinct, though now re-

appearing It has not come to my notice that lottery grants ever greatly blemished legislative proceedings, unless in Louisiana, but they contributed their share to the occasion for remedy against special legislation.

As in the case of lotteries, so in that of sectarian institutions, the ethical aspect has had more attention than the legislative Decision has been reached on the ground that appropriations which may directly or indirectly aid a religious sect, are inherently wrong, rather than because they harm Legislatures. Perhaps the first definite action taken was in Michigan, where in 1835 this was put into the Constitution: "No money shall be drawn from the treasury for the benefit of religious societies, or religious seminaries" Wisconsin copied this in 1848 and Indiana said much the same thing in 1851.

Kentucky in 1850 said the income of the common-school fund might be appropriated "in aid of common schools, but for no other purpose." It is not certain that a religious purpose was in mind, for the great anti-Catholic agitation that was to run through the country like wildfire within a few years, had hardly then made headway enough to reach the Constitutions, although the Native American movement had been swelling for a decade and more The first clear result of the agitation in the shape of organic law was a provision put in the Constitution of Ohio in 1851, to the effect that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State." Massachusetts came next in 1855, with an amendment put through by the Know-Nothing party, which had captured the State. It prevented appropriations to the schools of religious sects, but did not cover higher institutions of learning or other sectarian institutions, as the courts were afterward to hold, with the result that the issue remained to vex the politics of Massachusetts for three score years and more, until settled, it is hoped, by amendment in 1917 Minnesota came into the Union with a Constitution (1857) embodying the Michigan proviso, and so did Oregon Since the War, State after State has acted, until now less than a dozen remain without like constitutional prohibitions of one sort or another.

Official salaries furnish a peculiarly embarrassing class of special legislation The men concerned are often personal friends of members, and are almost always political allies of those who

control the Legislature. The temptation to unwarranted generosity is great. Some of the States have deemed it necessary to put stringent restrictions in their Constitutions. Thus Indiana in 1851 forbade the passage of any local or special law "in relation to fees or salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required." California in 1879 made the same prohibition, but left out the exception. Mississippi in 1890 changed it so as to cover "creating, increasing, or decreasing the fees, salary, or emoluments of any public officer." Virginia said this in effect in 1902, but restricted it to — "during the term for which they are elected or appointed."

In two thirds of the States salaries cannot be increased or diminished in the course of the term of office. A typical wording is that of the Pennsylvania Constitution of 1873 which says: "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment."

A kindred source of special legislation has been the desire of men working for the public to get more for their services than it was agreed they should have. For instance, contractors erring in their estimate or finding themselves losers because of unforeseen conditions, have asked to be reimbursed. Where partisanship has been strong, either Gratitude or Charity has found a willing helpmate in Politics. It is easy to be generous with the public money when a good fellow is to be pleased or helped out of a hole, especially if his political views and efforts are approved by his benefactor. So when Conscience began to get uneasy over special legislation, or perhaps it was when the tax-payers began to squirm, prohibition against extra compensation began to appear in the Constitutions.

It was a new State, Texas, that in 1845 made the start. Wisconsin in 1848 and Maryland in 1851 likewise prohibited. Ohio, however, in 1851, added the clause. "Nor shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two thirds of the members elected to each branch of the General Assembly." Iowa put the same uncertain provision into her Constitution of 1857, but West Virginia in 1862 made the prohibition absolute, as did Nebraska in 1866.

and then other States, until now more than half prevent this particular brand of legislative trouble.

The Massachusetts Special Committee on Legislative Procedure in 1915 gave figures showing the extent of the nuisance there. In the preceding five years 391 petitions had been presented calling for increased or special compensation — an average of almost eighty a year. These petitions often arouse controversies quite out of proportion to the amounts involved. Whether the Second Assistant Register of Probate of some county shall get twenty-two or twenty-three hundred dollars a year, may produce a fight costing the State more than the difference would amount to in a generation. The only offsetting gain is the impression spread among officials that it is no easy thing to get a salary raised by the Massachusetts Legislature, an impression worth while. Yet it is far from compensating for the damage done by the practice. Of course these are administrative matters that ought not to get into a Legislature at all.

In that same five years 392 petitions were presented for pensions, annuities, and kindred purposes. These, too, ought to be treated as administrative matters, and not permitted to distract a Legislature from its problems of real importance. In 1890 Mississippi decided to get rid of them by providing: "The Legislature shall not retire any officer on pay, or part pay, or make any grant to such retiring officer." South Carolina said the same thing in 1895, but omitted reference to a grant. Alabama in 1901 copied the Mississippi provision, and so did Oklahoma in 1907.

South Carolina also said the Legislature should not grant pensions except for military and naval service, and Virginia in 1902 included "granting any pension or pensions" in its list of local, special, and private laws forbidden. This may prove to be going to an unfortunate length. Perhaps the Virginia prohibition of pensions by special laws is wise, although it precludes the occasional opportunity to recognize the faithfulness of some official long in the public service, and possibly to save him from the acceptance of charity in his declining years. The South Carolina provision, however, is to be seriously questioned if it prevents the passage of general laws for pensioning public employees. Whatever defects and dangers are to be charged to the pension system (and they are many), the palpable fact is

that it is an almost inevitable corollary of the merit system, commonly spoken of as civil service reform. If our public servants are to have long tenures of office, ending on arrival at a fixed age, it must be recognized that the dispensations of Providence have not brought to all men the capacity for thrift. Apparently no human device can induce some men voluntarily to save against the needs of old age. We are developing devices for compelling them to do it by pension systems to which they must make contribution, through regular deductions from their salaries. It is generally thought just and wise for the State to contribute to the pension funds thus established for its employees. It has been my fortune to be concerned with the administration of one of these funds as a member of a retirement board, and my personal observation leads me to the belief that the system is bound to be of important service to the public and a great blessing to many individuals. Constitutional provisions interfering with it would be most unfortunate.<sup>1</sup>

More is to be said for the South Carolina provision that "The General Assembly shall not authorize payment to any person of the salary of a deceased officer beyond the date of his death." Mississippi and Alabama have said the same thing. It strikes at a class of special bills marked by want of logic. Customarily the balance of the salary for the term is voted with no regard to how much of the term remains. The heirs are fortunate if the term has just begun, whatever may be their need, it gets no recognition if the term is nearly ended. The practice does more credit to the generous impulses of legislators than to their judgment. Either by constitutional provision or, preferably, by statute, payment for a specified number of months ought to be provided in all cases, or the practice ought to be wholly forbidden.

Greece hit the salary and pension evil a body blow by putting into her Constitution: "No proposal regarding an increase of the budgetary expenditure by salary or pension, or in general for the advantage of a person, may originate from the House of Representatives." As Greece has no Senate, this restricts the initiative to the Ministry.

<sup>1</sup> If the social security legislation enacted by Congress in August, 1935, should conflict with and embarrass Federal or State retirement pension systems, it is greatly to be hoped that remedial amendment will follow.

## PROHIBITION BY CLASSES

The piecemeal action in the matter of special legislation up to 1850 meant that the people were seeking a cure. For more than half a century here and there they had tried palliatives. At last the growing pains brought one State to the point where she was ready for medicine really drastic. It was in 1851 that Indiana put into her Constitution: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." And to make clear what she meant, she enumerated seventeen kinds of absolutely forbidden local or special laws.

The idea made headway but slowly. For a decade the thoughts of men were engrossed with the great national disputes that led up to the Civil War, and they took little interest in problems purely local. Yet in 1857 Iowa named half a dozen and Oregon fourteen classes of forbidden local or special laws. The Illinois Constitution of 1862, which was rejected, would have forbidden a group of nine items. Also it would have removed the exception of 1847 that permitted incorporation by special acts for municipal purposes. When Nevada came into the Union in 1864, it was with a prohibition of sixteen classes of special bills. In the same year Maryland took action, specifying classes of local or special laws that the Assembly might not pass, and directing it at its first session thereafter to pass general laws covering the cases enumerated, "and for all other cases where a general law can be made applicable."

After the War the inefficiency of legislatures led the States to follow each other rapidly in the resort to prohibitions. Missouri began specifying in 1865, adding extensively to the list ten years later. Nebraska in 1866 forbade twenty-four classes of bills; Florida in 1868, thirteen; Illinois in 1870, twenty-three; Wisconsin, by amendment in 1871 (with further amendment in 1892), nine; West Virginia in 1872, eighteen. As a result of the recommendations of the Commission of 1872, New York fell into line. The Convention of 1867 had tried to accomplish the reform. Most of the delegates admitted that special legislation was an evil productive of confusion, log-rolling, extravagance, and corruption, but the Convention did not readily agree on the cure. Some, prominent among whom was Judge Folger, were convinced that the true remedy was to prohibit



absolutely the enactment of special laws on any subject. On the other hand Professor Dwight pointed out, what has since been the experience of the State, that special legislation could not be utterly suppressed, and that, if it were made unconstitutional, it would inevitably be attained under the guise of laws general in form but really operative only in some particular locality, or of laws passed merely for the accomplishment of a special purpose. The Convention at last agreed on clothing boards of supervisors with powers of legislation, forbidding special legislation in a great variety of cases, and prohibiting the Legislature from passing any local or private bill without due notice — but none of these things could escape the defeat that met the Constitution as a whole (barring the judicial article submitted separately) <sup>1</sup>

Governor Hoffman brought up the matter again in his message of 1872 recommending a Constitutional Commission. He urged a radical provision to compel the enactment of general statutes to cover a great variety of private, local, and special classes of legislation. He said that during the preceding twenty years the laws passed averaged five hundred a year, and for the preceding six years eight hundred a year, that there could be no necessity for this mass of legislation, that a thousand bills were passed in the course of a session, and that proper deliberation by the Legislature was impossible, that he had found himself obliged in the course of three sessions to withhold his official approval from an aggregate of three hundred and ninety-one bills, and more than a hundred other bills were recalled for amendment, that it was not right to rely solely upon the governor to review proposed legislation; and that it was almost inevitable that objectionable bills would "escape his scrutiny, and to which, if his attention had been called to them, he would have objected." Thirteen classes of bills were prohibited on the advice of the Commission.

Pennsylvania acted about the same time. For a decade complaints concerning the Legislature had been more insistent than ever before, and an agitation was started that had for its object the calling of a Convention further to limit its power. "The condition of affairs was partly due to the inferior character of some of the members of the Legislature and partly to the unscrupulous behavior of certain rich corporations which made a

<sup>1</sup> J. Hampden Dougherty, *Pol Science Q'y*, iv, 235

business of appealing to the cupidity of the more dishonest members for the purpose of obtaining legislation beneficial to their purposes. The usual method of conferring such benefits was the enactment of laws which are known as local or special laws... It was for the avowed purpose of prohibiting local and special legislation that the convention of 1873 was convened " <sup>1</sup>

In the seven previous years the Legislature had passed 475 general laws and 8,755 private acts. From 1866 to 1871 there were passed about 450 special acts bearing on railroads alone.<sup>2</sup> It was said by the Court in the case of *Ayar's Appeal* (122 Pa., 266, 1888) that in the session of the Legislature immediately preceding the adoption of the Constitution of 1873, nearly one hundred and fifty local or special laws were enacted for Philadelphia, and for other municipal divisions of the State about the same proportion. "This is by no means exceptional," observed the Court. "The pernicious system of special legislation, practiced for many years before, had become so general and so deep-rooted, and the evils resulting therefrom so alarming that the people of the Commonwealth determined to apply the only remedy that promised any hope of relief. Doubtless it was a proper appreciation of the magnitude of these evils as much as anything else that called into existence the Convention that framed the present Constitution, and induced its adoption by an overwhelming vote." The restrictions were adopted by the Convention with very little discussion, and it is clear from the debates that the delegates thought they had therein performed the chief part of their work. Twenty-six classes of bills were forbidden.

With the powerful example of Pennsylvania and New York added to that of the States previously adopting the same method, it is not surprising to find that since then a score of others have taken up therewith. To enumerate the variations would be tedious and of little help. Suffice it to say that the number of prohibited kinds of bills grouped in the Constitutions by themselves run from ten up to nearly forty, often with others scattered through the rest of the document. F. J. Stimson says the most concise classification he could make amounts to one hundred and twenty matters upon which special legislation is forbidden.<sup>3</sup>

<sup>1</sup> T. R. White, *Commentaries on the Const. of Penn.*, xxvi.

<sup>2</sup> *Debates of Penn. Convention of 1873*, II, 592

<sup>3</sup> *The Law of the Federal and State Constitutions*, 293

To be contrasted with the method of specific prohibitions is that of general prohibition. It takes the form of a declaration that no special law shall be enacted where a general law may be applicable. In five eighths of the States this is found, often in the nature of an omnibus clause, alongside a group of specific prohibitions. At least Massachusetts tries to reach the evil by a legislative rule, and possibly other States make the attempt in the same way or by statute. If the working of the rule in the Massachusetts Legislature may be taken as a criterion, it is of no great value. Presiding officers have ruled that it is the province of the committee, not of the President or Speaker, to determine whether the object of an application can be secured under existing laws, or without detriment to the public interests by a general law. This has taken the teeth out of the rule.

The idea of omnibus prohibition has in some States been applied through provisions relating to appropriations. Thus Illinois said in 1870: "The general assembly shall make no appropriation of money out of the treasury in any private law." Missouri said in 1875: "The General Assembly shall have no power to make any grant or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever. Provided, that this shall not be so construed as to prevent the grant of aid in a case of public calamity." In the same year Texas said essentially the same thing, and New Jersey said: "No donation of land or appropriation of money shall be made by the State or any municipal corporation to or for the use of any society, association, or corporation whatever." Two years later Georgia amplified its requirement of a two-thirds vote into: "The General Assembly shall not, by vote, resolution, or order, grant any donation or gratuity, in favor of any person, corporation, or association." North Dakota said in 1889: "Neither the State nor any county, city, township, town, school district, or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association, or corporation, except for the necessary support of the poor."

Pennsylvania, in her earnestness of 1873, tried to stop another loophole by prohibiting the indirect enactment of a forbidden special or local law by part repeal of a general law. Missouri copied this two years later, Louisiana in 1879, North Dakota in

1889 Kentucky in 1890 added the stipulation that the thing should not be accomplished by exempting from the operation of a general act any city, town, district, or county. Alabama in 1901 made still another addition by requiring that no bill introduced as a general law should in the course of its passage through the Legislature be so amended as to make it local, special, or private. Virginia, copying the Pennsylvania provision in 1902, appears not to have thought the Kentucky and Alabama additions necessary.

Evasions of constitutional prohibitions in behalf of municipalities may here and there be set down to individual self-interest and personal ambitions. Yet for the most part they manifestly disclose a public-spirited purpose and must be reckoned with seriously. According to their lights, most of our citizens who take an interest in local government mean to be honest. Despite sporadic instances to the contrary where whole communities seem to be corrupt, the great bulk of our local officials, despite prevalent opinion usually founded on ignorance or slander, are decent, law-abiding men. How, then, explain their constant attempts in many States to violate the spirit of the Constitutions they are sworn to support? May it not be that in the particulars in question they are honestly convinced that the Constitutions are unwise, unfair, and oppressive?

Nearly two thirds of the 280 pages in John F. Sanderson's work on "The Validity of Statutes," reviewing the course of judicial decision in Pennsylvania for the twenty-five years succeeding the adoption of the Constitution of 1874, are devoted to the subject of local and special legislation with reference to municipalities. As a Committee of the Pennsylvania Bar Association said in 1899, "this fact is in itself sufficient evidence of the galling and burdensome character of the restriction." The Committee further said "Without seeking to be exact, it is safe to say that since 1874 hundreds of Acts of Assembly have been vetoed on the ground that they were in violation of this prohibition of the Constitution, and almost as many have been declared unconstitutional by the courts." As the Committee observed in its forcible but very temperately worded report: "It is neither safe nor fair to set down the continual efforts to escape the constitutional prohibition, to the perversity of the people or the wilfulness of the Legislature. On the contrary they demonstrate the deep-seated and general discontent upon the part of the

municipalities of the State with the restrictions imposed by the Constitution." <sup>1</sup>

The situation discloses the fundamental weakness of general laws. Uniformity of procedure has of course many advantages. Standardization brings to a government benefits like those it brings to industry. Nevertheless much might be said in defense of Simon Sterne's argument that it would in fact be the greatest merit of any system of laws that they varied exactly as every case varied in its elements. "It is," he thought, "general and indiscriminating rules that constitute the harshness of any system of laws — rules which, subjecting special classes of persons to unintended and unforeseen oppression, require for their mitigation the arbitrary modifications of the judicial construction of courts of equity. The more a legislature is civilized, the more it measures and considers differences in each class of cases and adjusts the law to their varieties" <sup>2</sup>

However plausible the argument for uniform treatment of localities, the palpable fact is that localities do succeed in convincing even the most conservative of Legislatures that they deserve exceptional treatment. Of 2026 bills referred to committees in the Massachusetts General Court of 1915, it has been computed that 24 per cent related to specific localities, of the bills passed, 32 per cent so related <sup>3</sup> Whether or not the situation in this particular State has been relieved somewhat as a result of legislation tending toward more uniformity in city charters, it is safe to predict that there will continue to be a great variety of occasion for individual treatment

Michigan in its Constitution of 1908 took what many would think a forward step, by requiring that no local or special act shall take effect until approved by a majority of the electors voting thereon in the district to be affected. Experience seems to have shown the need of transgressing the principle, for in 1916 an amendment excepted acts repealing local or special acts in effect January 1, 1909, and receiving a two-thirds vote in the Legislature. If the principle is valid, why any exception? Did not the amendment admit that there are situations where local judgment is not the wisest? If that is not the case, why should

<sup>1</sup> 5 *Ann. Report of Penn. Bar Assn.*, 137.

<sup>2</sup> "Legislation," *Lalor's Cycl. of Pol. Science*, II, 755

<sup>3</sup> W. H. Haines, "Legislative Activity in Mass.," *Am. Pol. Sc. Review*, Aug. 1917.

not local judgment always prevail, without the intervention of the Legislature at all? Of course the answer is that as in the case of the bicameral system of the Legislature itself, the concurrence of two judgments may be desirable, to guard against the excesses, perversions, or incompetencies of either. Granting this to be true, it is an argument that works both ways. The work of a wise Legislature may just as easily be thwarted by a foolish constituency, as that of a foolish Legislature by a wise constituency. In other words, lack of wisdom on either side will prevent progress, just as abundance of wisdom on either side will prevent error. Therefore on the whole it would seem as if provision of this sort is conservative, if not reactionary.

#### LEGISLATION AND LITIGATION

Whatever else may be said as to the effect of restrictions, they certainly have reduced the volume of business and the length of sessions, at any rate for a time. C. L. Jones in "Statute Law Making" and J. Q. Dealey in "Our State Constitutions," give abundant proof of this. The private laws of Illinois in the year before it prohibited twenty-three classes of bills, are said to have covered 3354 pages. Those passed by the five subsequent Legislatures fell so in number that their average was but 228 pages. The lawmaking of the biennial sessions in the decade following the reform in Pennsylvania averaged to take 294 pages, where that of the annual sessions in the preceding decade had averaged to take 1131 pages. The Legislature of Alabama, in the 1901 session of 113 days under a Constitution that had few restrictions on special legislation, passed 1132 laws, only 90 of which were general. Under the new Constitution containing many restrictions, two sessions of 80 days in 1904 passed 803 laws, of which 179 were general. At the last session under the old Constitution of Virginia, 1901-02, in 91 days were passed 694 laws, 87 of which were general. In 1902-04, under a new Constitution, in the course of several sessions lasting 267 days were passed 608 laws, 317 of which were general. In the regular session of 62 days in 1904 were passed 262 laws, 135 of which were general. The product of the session of 1899-1900 covered 1421 pages, and included about five hundred bills pensioning Confederate soldiers. The editor of the laws significantly remarked that "in several instances two acts were passed giving a pension to the same person." After the new Constitution went into effect,

pension legislation at once fell to six acts, one of general application, and this item was practically removed from subsequent legislation. The product of the first normal session under the new system covered 378 pages.

Most State Legislatures meet in the odd years. In 1901 those that met passed 13,854 laws, 5318 of which were general. In 1903, 14,098 laws were passed, 5198 of which were general. In 1905, 13,172 laws were passed, and 5608 were general. If the legislation of all the States in the legislative period 1904-05 be considered, 18,937 laws were passed, 8362 of which were general. In that same period the New England States, whose Legislatures are most unrestricted, passed 3877 laws, of which 1162 were general. Six States (California, Idaho, Illinois, North Dakota, South Dakota, and Utah) whose Legislatures are fully restricted, passed 1558 laws, 1127 of which were general. In other words, New England special legislation was 70 per cent of the whole, and that of the other six States but 28 per cent of the whole.

F J Stimson said that Connecticut, Massachusetts, New Hampshire, and Vermont, were the only States without restrictions on the passage of local or special laws.<sup>1</sup> I find, however, that New Hampshire has made at least one provision on the subject, for it declared in 1892 "The general court shall not authorize any town to loan or give its money or credit, directly or indirectly, for the benefit of any corporation having for its object a dividend of profits, or in any way aid the same by taking its stock or bonds." The only requirements I find now in the Rhode Island Constitution are one for a two-thirds vote on appropriations for local or private purposes, embodied when the first Constitution was framed (1842), and one in an amendment of 1892 providing for incorporation by general law, which excepts corporations with the power to exercise the right of eminent domain, or to acquire franchises in streets and highways; for these a special act is still to be secured. Maine at the start (1819) said the Legislature should provide by general laws "for all matters usually appertaining to special or private legislation," but took the sting out by the phrase "as far as applicable." I observe no other restrictions except the prohibition of incorporation by special laws, and of loaning the credit of the State. It may, then, be said with accuracy enough that no New England

<sup>1</sup> *The Law of the Federal and State Constitutions*, 293 note (1908).

State has tried seriously by constitutional provision to hamper its Legislature in the matter of special, local, or private bills. Everywhere else the attempt has been more or less serious and extensive. Inasmuch as New England Legislatures and New England legislation are far and away the best in the country, some inferences from this may not be unreasonable.

Although the figures quoted indicate a gain of no small consequence in the States outside New England, may there not have been offsetting losses in amount more than enough to balance?

In all the States where prohibitions have been tried, sundry effects are to be observed that strongly suggest jumping out of the frying pan into the fire. For example, the complaint had been that special laws produced legal uncertainties. Their prohibition produced many more, greatly increasing the volume of litigation and the perplexities of the lawyers. This came about chiefly through the evasions that were quickly devised. Men felt they had a right to the relief of genuine grievances, or to be freed from unnecessary hardships, or that they ought not to be thwarted in the execution of honorable enterprises hindered by general laws — in brief, that exceptions from general laws were warranted. Legislators were speedily persuaded to connive at remedies complying with the constitutional forms, but violating their spirit and purpose. One common expedient was the passage of bills nominally general but actually special. Another was the amendment of a general law so that in effect it met a particular case. This unsettled the general body of the law more than ever. Well-established standards were so often modified that no lawyer could be sure of his ground without a critical examination of the statutes upon every occasion. Even after much examination, confidence became impossible until the courts had spoken as to whether the Constitution had been successfully evaded.

In his message of 1901 Governor Gage of California said: "It is a matter to be regretted that the constitutional provision against special and local legislation is so far-reaching in its effects. While the evil that was intended to be remedied and guarded against was a very serious one, still the new evil of the enactment of general laws to fit special cases is more serious." So he urged amendment to permit "necessary exceptions." This, however, would be merely undoing most of what had been done. Would it amount to much more than saying that a law



ought to be general except when it ought to be special? To be sure, there might be some gain in trying to set forth when it ought to be special, but the difficulty of anticipating contingencies makes an attempt of this kind almost sure to fail.

The litigation due to the prohibitions has been in part caused by the difficulty of applying the rule that in all cases where a general law can be made applicable, no special law can be enacted. "Who is to decide when a general or a special law will answer the best purpose?" Judge Adams asked that question in delivering the opinion of the court in *State v. Boone County Court*, 50 Mo. 317 (1872). And he answered it by saying "It strikes me that this rule, in reference to general or special laws, is laid down as a guide for the Legislature, and the Legislature is to judge of the necessity of the particular case. The Legislature is quite as able to do this as the courts. The Legislature must, in the first instance, exercise their discretion as to the necessity of a special instead of a general act. How can the courts control that discretion? If a discretion be conceded at all, in my judgment the courts have no right to control it." In various other States the highest courts took the same view, and in 1911 the Oklahoma court said the overwhelming weight of decided cases was to that effect.<sup>1</sup>

To stop the harm that resulted, the States began to make changes in their Constitutions. Missouri led, in 1875, declaring it to be a judicial question whether a general law could have been made applicable, and to say that as such it should be judicially determined without regard to any legislative assertion on the subject. Minnesota copied this in an amendment of 1892, Alabama rephrased it in 1901, Kansas in 1906 found another way of saying it, and Michigan in 1908 boiled it down to — "whether a general act can be made applicable shall be a judicial question." Governor Hodges of Kansas told the Governors' Conference of 1913 that the amendment was made necessary in his State, "by the continual flood of special acts which were passed by the Legislature notwithstanding the constitutional provision against such legislation." He added: "And I regret to say that even this amendment has not remedied the evil."<sup>2</sup>

The courts, however, have been far from unanimous in put-

<sup>1</sup> *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 28 Okla. 275

<sup>2</sup> *Proceedings*, 248, 254

ting the responsibility on the Legislatures. In many instances they have not tried to evade the duty of decision but have gone back of acts general in form to see whether they were special in application, and so finding them, have declared them unconstitutional. Perhaps their most common control has been over that class of evasions attempted in the classification of cities. As an illustration of the absurd lengths to which these have been carried, note the attempt to legislate specially for the city of Titusville, Pa., by passing an act relating to all cities of 5000 inhabitants, situated at a distance of more than 27 miles by the usually traveled road from the county line in a county of more than 60,000 inhabitants. This was held invalid in *Com. v. Patton*, 88 Pa. 258 (1878). Courts have very generally held that a classification based merely upon geographical considerations is improper. They have also held (*City of Council Grove*, 20 Kas. 619) that a classification of cities by name is improper. On the other hand they have commonly regarded a classification of local corporations by population, which is to operate in the future as well as the present, to be reasonable, even if, at the time the classification is made, only one city is found to be in a class.<sup>1</sup>

Ohio is said to be practically the only State in which the courts have decided that a constitutional provision prohibiting special legislation does not permit the Legislature to classify municipal corporations.<sup>2</sup>

In New Jersey an ingenious way to evade the prohibition has been found in the passage of laws general in form but with operation made conditional on the local adoption of their provisions by referendum vote. This subterfuge has become a frequent resource of those seeking privileges which if asked in a general law would not receive the approval of the Legislature. Conditional acts in great number are passed relating to drainage, the water supply of cities, salaries of officials, municipal debt, taxation, purchase of land, and a host of like subjects.<sup>3</sup>

<sup>1</sup> *Wheeler v. Philadelphia*, 77 Pa. St. 338.

<sup>2</sup> *State v. Cowles*, 64 Ohio St. 162 (1901).

*State v. Jones*, 66 Ohio St. 453 (1902).

*State v. Beacom*, 66 Ohio St. 491 (1902).

<sup>3</sup> C. L. Jones, *Statute Law Making*, 35, 36.

## CHAPTER XX

### HANDLING SPECIAL BILLS

NEW laws always mean change, always disturb status. As a rule somebody gains, somebody loses. They exemplify the saying that what is one man's meat is another man's poison. In the case of general bills, the advantage and the injury are usually diffused, in the case of special bills, the gain is usually and the loss is sometimes concentrated. Because special bills often benefit one man or a few men to the direct harm of others, and because the element of justice is often prominent in them, they have been viewed as to some extent of a judicial nature. A judicial procedure, however, determines what is right and wrong by existing canons. The private bill may create a new right and wrong. On the other hand its purpose may be to remedy a wrong not reachable in ordinary judicial procedure. Then it is nothing but a method of administering equity.

Even the benevolent aspect of some special legislation is not to be denounced unhesitatingly. Something is to be said for public generosity. He who doubts that will do well to reflect on what our forefathers thought about a gift to John Humfrey, one of the founders of the Massachusetts Bay Colony, described by Winthrop as "a gentleman of special parts of learning and activity, and a godly man." Ill fortune attended him, and by 1639, being brought low in his estate, and having many children, he offered himself to the service of the lords of Providence (an island off the Nicaraguan coast) and was accepted to be its next Governor, whereupon he labored much to draw men to join with him in removing to the West Indies. This was looked at, both by the General Court and by the elders, as an unwarrantable course, and yet they seem not to have nourished any ill will because of it, for when Humfrey's barn, corn, and hay were burned, the Court gave him 250 pounds. Winthrop had occasion to make this entry in his Journal, June 21, 1641:

"Offence being taken by many of the people that the court had given Mr. Humfrey 250 pounds, the deputies moved it might be ordered, that the court should not have power to grant any benevolences, but it was considered that the court could not

deprive itself of its honor, and that hereby we should lay a blemish upon the court, which might do more hurt to the country by weakening the reputation of the wisdom and faithfulness of the court in the hearts of the people, than the money saved would recompense. Therefore it was thought better to order it by way of declaration, as if it were to deter importunity of suitors in this kind, that the court would give no more benevolences till our debts were paid, and stock in the treasury, except upon foreign occasions, etc."

Special laws are sometimes the only way for securing justice in particular cases, sometimes the best way to advance the public welfare by opening the door of opportunity to men of enterprise. In time of public emergency they may furnish the only avenue for safety or relief. In normal times they permit valuable experiment. This advantage is worth examination. It has been well described by a veteran newspaper man of Massachusetts, who at short range watched the Legislature for many years and whose judgments commanded respect.

"The critics fail to perceive," said Mr. Bridgman, "that special acts must often precede general acts. For a long time there was a fruitless, but honest and persistent endeavor to draft a general water-supply act which should remove the need of a charter for every new company. It was years, in spite of repeated efforts, before a general law could be passed for safe deposit, loan, and trust companies, and in these years many special charters were issued. City charters were of necessity at first special, in the divergence of local circumstances and in the lack of experience in city administration. Special acts are the pioneers in the growth of the State. They are inevitable in the advance into a new field or upon a higher plane. As instances multiply, generalizations are made from the different experiences, and so general laws become possible. But until a new race of statesmen is bred, special acts will, as a rule, precede general. As fast as possible special acts are made general, and to clamor for the latter before their time is useless. It is only when the generalization from special acts is not prompt that there is good ground for complaint. But special acts which mark a State-growth in a new line require time for discussion, both to be wise in themselves, and to set a wise precedent for coming general acts."<sup>1</sup>

<sup>1</sup> R. L. Bridgman, *Biennial Elections*, 125

An English expert who approached public questions from the starting-point of a man of science, reached like conclusions. "I maintain," said Professor Jevons, "that, in large classes of legislative affairs, there is really nothing to prevent our making direct experiments upon the living social organism ... Social progress is social experimentation .. Changes effected by any important act of Parliament are like storms, earthquakes, and cataclysms, which disturb the continuous course of social growth. Sometimes they do much good, sometimes much harm; but in any case it is hardly possible to forecast the result of a considerable catastrophic change in the social organism. Therefore I hold unhesitatingly that, whenever it is possible, legislation should observe the order of nature and proceed tentatively. No doubt, by the aid of an elaborate machinery of administration and a powerful body of police, Government can, to a certain extent, guide, or at any rate, restrain, the conduct of its subjects. Even in this respect its powers are very limited, and a law which does not command the respect of the body of the people must soon be repealed or become inoperative. But, as regards the creation of institutions, Parliament is almost powerless, except by consulting the needs of the time, and offering facilities for such institutions to grow up as experience shows to be successful. But an unfortunate confusion of ideas exists, and it seems to be supposed that, because for reasons of obvious convenience the civil and criminal laws are as a general rule made uniform for the whole kingdom, therefore, the legislative action of Parliament must always be uniform and definitive.

"Perhaps it may be said that every new law is necessarily an experiment, and affords experience for its own improvement, and, if necessary, its abrogation. But there are two strong reasons why an act which has been made general, and has come into general operation, can seldom serve as an experiment. If an act comes largely into operation it is practically irrevocable. Parliament cannot say simply 'as you were,' and proceed to a new and more hopeful experiment. A social humpty-dumpty can not be set up again just as it was before even by the Queen's men. The vested interests created are usually too formidable to be set aside, and too expensive to be bought up. A good many years, say seven, or ten at the least, are needed to develop properly any important legislative experiment, so that the same generation of statesmen would not have more than three or four op-

portunities of experiment in the same subject during the longest political career. If we divide up the country, and try one experiment on one town or county, and another on another, there is a possibility of making an almost unlimited number of valid trials within ten or twenty years." <sup>1</sup>

If, then, special legislation has definite advantages, if at most it cannot be wholly escaped, if experience shows that in any event it cannot be wholly prevented, why not see if some way is not feasible to lessen its injuries and expand its benefits? The remedies we have tried are in large part failures. As Henry Sedgwick puts it, the constitutional rules are "a clumsy and unsatisfactory method of guarding against injustice and jobbery" <sup>2</sup> Surely we will not admit impotency. Surely we will not confess that improvement is impossible.

To an American studying what's to be done, the first suggestive fact presenting itself is that the English, whether wholly successful or not, have handled the problem much better than we have, and the prime reason seems to be that they have recognized the quasi-judicial character of special legislation.

#### PRIVATE BILLS IN ENGLAND

In England until the 18th century the greater number of Private Bills were Personal Bills and largely for the purpose of obtaining redress of grievances. In the course of time, owing to the provision of other remedies in the courts, Personal Bills, with a few exceptions of a technical nature, ceased, and Private Bills became restricted to the purpose of conferring special powers for public or semi-public objects upon local authorities or corporate bodies.

Their treatment is based on the assumption that the interests uppermost are private. The bearing of such a bill on the public welfare is not ignored, but it is the secondary consideration. Primarily Parliament is to decide between opposing sets of individual considerations. It is supposed that the passage of the bill will help A and hurt B. In essence, therefore, the matter is a judicial proceeding. As such it is treated, with many of the forms, the safeguards, and the assumptions of a procedure in the courts of law. That all parties in interest may have due notice,

<sup>1</sup> W. Stanley Jevons, "Experimental Legislation," *Contemporary Review*, reprinted in *Popular Science Monthly*, April, 1880.

<sup>2</sup> *The Elements of Politics*, 437.

the bill must be deposited about two months before the opening of the session of Parliament. It is first considered by the Lord Chairman and by the Chairman of Committees in the Commons, with their legal advisers. Any clauses to which they object are discussed with the promoters, who in practice must give way on points that are pressed.

Official Examiners appointed by the Speaker and the House of Lords determine all facts relating to compliance or non-compliance with the Standing Orders. To save time and to prevent expense to the parties that might result from conflicting decisions in the two Houses, these Examiners report to both of them. The Examiner appointed by the House of Commons has also the duty of taxing costs.

Private bills are divided between the two Houses as convenience directs. When such a bill is reached in the order of business, it is not usually opposed on first and second reading, although there is sometimes contest on second reading. As a rule, though, the first step in opposition is to carry the matter to what the English call a select committee — what we would call a special committee. This is named by a Committee of Selection. If of the Commons, the select committee usually has four members, if of the Lords, five. This committee is to be virtually a trial court. Its judicial function is stressed by the requirement of attendance of all members save in case of sickness or by order of the House. The Chairman and each member must sign a declaration in which he declares he is not locally nor personally interested in any of the bills.<sup>1</sup>

The persons whose interests are to be promoted appear as suitors. Those who apprehend injury are admitted as adverse parties. Counsel are heard and witnesses examined. The bill has a preamble giving the reasons for recourse to legislation. The first business of the Committee is to pass on those reasons. If they are approved, then the clauses are considered in order, amendments are made if thought desirable, and the conclusion is reported to the House. There the bill has to be read a third time and passed, as in the case of a public bill. Opposition in the House is rare except on grounds of general principle. The practice is to assume that the questions raised by private bills can be more satisfactorily settled by a small special committee than

<sup>1</sup> G. F. M. Campion, *An Introduction to the Procedure of the House of Commons*, 267, 268.

by a large assembly, and the committee report usually prevails.

The analogy to a judicial proceeding shows itself further in the fact that if the petitioning party abandons the measure, it falls, no matter how much merit the House may see in it. Yet the legislative aspect is not lost from sight, for although the promoters may prove the benefit to themselves, may show that nobody in particular will be hurt, and may be confronted by no one with specific complaint or objection, yet if the bill be thought liable to harm the public, it will be rejected or so amended as to make it innocuous. Government departments are required to report on all private bills with which they are concerned in any way. No measure imposing any duties on a department may be introduced as a private bill. In the case of a proposal within the province of the Local Government Board, its consent is necessary, but in practice that is withheld only if the object could be obtained in a simpler way, as by a Provisional Order. The House of Commons now appoints in each session a special committee, called the local legislation committee, and refers to it all private bills sought by municipal or other local authorities, proposing to create powers relating to police, sanitary, or other local government regulations that conflict with, deviate from, or go beyond, the provisions of the general law.

Courts of equity look on a private bill so much in the light of an ordinary suit, that promoters have been restrained by injunction from proceeding with a bill which would, in effect, set aside a contract made by them. Also opponents may be restrained by injunction. The flavor of legal proceedings further appears in the matter of fees. In olden times it was the custom to allow the officers of both Houses, from the Clerk to the doorkeepers and from the Speaker to the Serjeant's men, to obtain their principal remuneration from fees. As regards private bills, it may be that the practice was imported from the courts by the Clerks of Chancery, who, in the middle of the fourteenth century, were charged to receive petitions that might give rise either to litigation or legislation <sup>1</sup>

Although the abuses that came to cluster around the system have of late been in a measure removed, fees still present themselves at almost every step. The minimum fees for the various stages in the House itself, taken together, are never less than

<sup>1</sup> F. H. Spencer, *Municipal Origins*, 83



thirty-five pounds, and they increase according to the amount involved, up to four times as much. There is, moreover, a fee of ten pounds for each day that the committee sits, if the promoters appear by counsel, and of five pounds if they do not. Fees on a smaller scale are also charged to opponents. Altogether the annual receipts of the House of Commons from private bill legislation average more than forty thousand pounds, while its expenses on that account are less than twelve thousand. In the House of Lords the fees are arranged somewhat differently, but they are, on the whole, about as large; so that the parliamentary charges on the smallest unopposed private bill amount to more than 190 pounds. Then there are the expenses of parliamentary and local agents, of printing, advertising, and, in the case of opposed bills, of counsel, witnesses, and experts. Sometimes all this makes a very large sum. Birmingham, for example, spent £44,750 in 1892 in promoting a single bill.

The total amount spent by local authorities in the United Kingdom during the seven years from 1892 to 1898 in promoting and opposing private bills was £1,396,407, while private companies expended for the same purpose £2,806,813. Adding the smaller sums spent on provisional orders, and those paid out by harbor and dock boards, the grand total consumed in private legislation was £4,496,834.<sup>1</sup>

President Lowell told a committee of the New York Constitutional Convention, June 10, 1915, that in a contest between Manchester and Liverpool on the petition of Manchester to build the Manchester ship canal, the legal expenses were \$1,000,000. Thereupon Seth Low said he remembered seeing a ferryboat crossing the Thames years ago, and being told the reason that they did not have a bridge was that it would cost four thousand pounds to get permission from Parliament, and it was cheaper to maintain the ferry.<sup>2</sup>

Lord Brougham in 1860 proposed for the handling of private bills a court or board of five judges, appointed by the Crown and removable only on a joint address of both Houses. As he would have allowed petitioners to oppose in both Houses a scheme approved by this Board, costs would have been swollen still further, making the project seem to many impracticable. In 1870 Lord Romilly, Master of the Rolls, said he did not believe any

<sup>1</sup> A. L. Lowell, *The Government of England*, I, 386, 387

<sup>2</sup> N. Y. Conv. Doc. No. 14, p. 32

private bill could pass, if opposed, at an expense of less than a thousand pounds. In going over the accounts of a railway company when he was on the bench, he found the item of ten thousand pounds for secret service money paid to members of Parliament. Romilly said he disbelieved the item and would not allow it, but he mentioned the circumstance to show the scandal that arose from the system of private legislation.

Such conditions seem to an outsider quite indefensible in the case of legislative action that ought not to be taken at all unless it is charged with a public interest, however indefinite. The excuse is given that high fees are an earnest of good faith and tend to check private speculation in concessions. Yet one recalls the pledge of Magna Charta that justice shall not be sold.

Another criticism is aimed at the slowness of the proceeding. The probability is against accomplishment of all the stages inside of from fifteen to eighteen months after the decision to promote a measure has been taken by the local authority. Furthermore, there has long been complaint because the system interferes with the more important work of Parliament and because of the strain it puts on members. Sir John Mowbray, speaking with the voice of authority to a committee on Private Bill legislation in 1888, said "I do not deny the competence of committees or the satisfaction which their decisions give, but I think there must be a change, and that sooner or later Parliament will have to transfer its jurisdiction on private bills to some external tribunal." He gave as one reason the increasing difficulty in manning committees, owing to the growing pressure on the time of members of Parliament. Robert Arthur Sanders, addressing the Select Committee on House of Commons Procedure in 1914, said he thought if private bills were taken away from the House altogether, the interests of the public at large would be quite as safe before a judicial tribunal.

Yet it is President Lowell's conclusion that though the system has its defects, they are far more than outweighed by its merits. "The curse of most representative bodies at the present day," he says, "is the tendency of the members to urge the interests of their localities or their constituents. It is this more than anything else that has brought legislatures into discredit, and has made them appear to be concerned with a tangled skein of private interests rather than with public welfare. It is this that makes possible the American boss, who draws his resources from

his profession of private bill broker. Now the very essence of the English system lies in the fact that it tends to remove private and local bills from the general field of political discussion, and thus helps to rivet the attention of Parliament upon public matters. A ministry stands or falls upon its general legislative and administrative record, and not because it has offended one member by opposing the demands of a powerful company, and another by ignoring the desires of a borough council. Such a condition would not be possible unless Parliament was willing to leave private legislation in the main to small impartial committees, and abide by their judgment."<sup>1</sup> (The Ministers do not give an opinion on private bills. In 1872 a proposal "to place in the hands of a Minister, or of the Ministers of the crown, the power of putting a veto on private legislation" was disapproved by the House and by the government. On general principles, as well as on account of their pressing official duties, the occupants of the treasury bench are exempt from serving on private bill committees.)<sup>2</sup>

Simon Sterne, well-acquainted with legislative practice in several of the American States, followed a private bill in Parliament from its inception to its adoption, and returned full of enthusiasm for the English procedure. He considered it absolutely no exaggeration to say that the difference in favor of the English method as against the American, is in every respect as great as the difference between the procedure, practice, and judicial results in the Supreme Court of the United States, and the procedure, practice, and judicial results of a tribunal in a semi-civilized community such as Siam or Arabia. He held that England, by adopting this course of bringing method into legislation, has accomplished three distinct and important results.

"In the first place, it has prevented the possibility of smuggling a private or local bill through the Houses of Parliament. Without adequate and complete notice to interests which might be adversely affected by it, such a bill cannot even be introduced.

"Secondly, it has imposed the work and the expense of special legislation upon the parties who seek it, and made every possible provision that no injury should be done by the granting of the special law.

<sup>1</sup> *The Government of England*, I, 391

<sup>2</sup> A. Todd, *Parliamentary Govt in England*, II, 67-68.

"Thirdly, it has ridden itself of the lobby. When the grant by special legislation went no longer by favor but by merit, and when the vote of the legislator could no longer be won by underhand means, the class of men who theretofore had been serviceable in the lobby of the House of Commons could no longer be made useful, and a trial requiring trained intellects being the condition precedent to a grant of power, the parliamentary lawyer took the place of the lobbyist. In short, there is as great a distinction between the men who now promote private and special legislation in England and the men who promoted it before the existence of the Standing Orders, as there is between a lawyer who argues a case before a common law tribunal of dignity and the go-between of a Turkish court to fix the judge in a suitor's behalf by a propitiatory gift" <sup>1</sup>

Canada's practice stands midway that of Parliament and ours. After second reading private bills go to large standing committees. In the Senate no petition for such will be received after the first three weeks of the session, in the House, after six weeks. Bills have to pass the scrutiny of an Examiner of Petitions (who deals with formalities), or the Committee on Standing Orders (which operates usually in case of irregularities), and without favorable report therefrom are not to be further considered. The applicant has to pay a fee of \$200 and the cost of printing the resulting Act in the Statutes. The Supreme Court or any two of its Justices shall examine and report upon any private bill or petition for a private bill referred to the court under any rule of either House.

#### IN THE UNITED STATES

John Quincy Adams wrote in his Diary, February, 23, 1832 (VIII, 480), with his wonted acumen: "There ought to be no private business before Congress. There is a great defect in our institutions by the want of a Court of Exchequer or Chamber of Accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One-half the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice." <sup>2</sup>

The day may come when Congress and the Legislatures will

<sup>1</sup> "Crude Methods of Legislation," *No American Review*, Aug 1883

<sup>2</sup> *Memours of John Quincy Adams, Diary*, February 23, 1832, VIII, 480.

admit the truth of this and throw off much of the burden, but it is beyond the range even of hope that they will shed it all, even if that were so clearly desirable as Mr Adams thought. Yet whether much or little is kept in their own hands, the palpable thing is that the English method of giving it separate and suitable treatment is wise

An attempt looking in this direction was made at Albany in 1879, the idea being formulated in a plan for sifting out the private bills. All such measures were to be filed on the first day of the term, and if the taking of private property was involved, all persons concerned were to be previously notified. The Governor should then appoint three examiners to see to it that all preliminaries had been fulfilled. The bills were then to be heard before legislative committees, sitting as courts, with the power of summoning and hearing witnesses and of imposing fines upon those who trifled with the privileges so granted. The plan was not approved. Samuel P Orth, writing on the subject in the "Atlantic," January, 1906, says it was too advanced to commend itself to the judgment of the legislators. Mr Orth thinks that if the Legislature could choose a standing commission on local bills, such commission to hold sessions *ad interim*, and to have the power to investigate all local bills and report to the succeeding Legislature, many of the private bills could be easily sifted. In his mind the principal objection to this plan is found in the changing nature of our state politics. "The commission appointed by one Legislature would hardly find favor in the eyes of its successor."

A few States have tried the regulation of legislative procedure in the matter. Georgia put into her Constitution of 1877: "All special or local bills shall originate in the House of Representatives. The Speaker of the House of Representatives shall, within five days from the organization of the General Assembly, appoint a committee consisting of one from each Congressional District, whose duty it shall be to consider and consolidate all special and local bills, on the same subject, and report the same to the House. and no special or local bill shall be read or considered by the House until the same has been reported by said committee, unless by a two-thirds vote. And no bill shall be considered or reported to the House, by said committee, unless the same shall have been laid before it within fifteen days after the organization of the General Assembly, except by a two-

thirds vote " By amendment this was stricken out after a few years of trial <sup>1</sup>

Mississippi, in 1890, required a standing committee of each House on local and private legislation. If its conclusion favors, the written report must state affirmatively the reasons, "and why the end to be accomplished should not be reached by a general law, or by a proceeding in court." If the report is adverse, the bill may not be passed save by a majority of all members elected.

The Virginia Constitution of 1902 provided for the appointment of a joint committee, of five Senators and seven Delegates, "on special, private, and local legislation." Any special, private, or local bill must go to this committee first, which is to report "with a statement in writing whether the object of the bill can be accomplished under general law or by court proceeding." This committee can be discharged from considering such measures only by a Yea and Nay vote.

Judging by the abandonment of the experiment in Georgia and by the product of the Legislatures in Mississippi and Virginia, these devices have not proved themselves adequate. A Governor of another Southern State who must have known of them approvingly suggested instead the adoption of a system, "by which all bills of a local, special, or private nature should be submitted, only after proper notice, to a select body of experts, lawyers of training and experience, employed at an annual salary by the State, and whose report, after full hearing of all parties interested, should finally determine whether such bills should be introduced or rejected" <sup>2</sup>

For the handling of local bills the Maryland Legislature has a unique procedure. When such a bill is introduced in the House of Delegates it is referred to a select committee made up of the members from the county involved, with another added in case there are but two from the county. In the Senate bills relating to Baltimore go to the six members from that city, relating to other counties they go to the Senator from the county involved, who sits, theoretically, with two other members, usually from nearby counties. House and Senate almost invariably accept the recommendations of these select committees. <sup>3</sup>

<sup>1</sup> *Laws of 1884-85*, p. 33

<sup>2</sup> Emmet O'Neal, "Distrust of State Legislatures," *No Am Review*, May, 1914

<sup>3</sup> *Am Pol Science Review*, February, 1933, p. 78

The Committee on Jurisprudence of the American Bar Association some time ago recommended (Reports, ix, 282) the English idea — a trial of the merits of all private bills, with the aid of counsel to represent the public, and at the expense of the petitioners. The New York Commission of 1872 recommended that persons proposing private or local bills should bear some portion of the expense of printing them, but no constitutional provision has been made.

The Commission of the same State to recommend changes in methods of legislation advised in 1895 "that a proportionate share of the printing expenses incident to a legislative session, which amounted, during the last session, to the sum of \$200,000, should be borne by the parties interested in the bills, and in whose interest and at whose request legislation is considered, particularly monied corporations, stock corporations, or private individuals." No constitutional change has yet resulted. Virginia prescribed by law in 1896 that private bills should be printed under the supervision of, and on terms secured by, the Superintendent of Printing, but at the expense of the applicant. Connecticut in the same year enacted that persons or corporations interested must deposit \$5 for each page of a bill or resolution affecting private interests, other than appropriation bills or resolutions. the deposit to be refunded should the bill not be passed. It is required in Connecticut that a fee of \$100 shall be paid on application for an act or resolution incorporating any commercial or manufacturing corporation, or any corporation without capital stock. The Florida Constitution of 1865, which lived three years only, had this provision. "No act incorporating any railroad, banking, insurance, commercial, or financial corporation shall be introduced into the general assembly, unless the person or persons applying for such corporation shall have deposited with the treasurer the sum of one hundred dollars as a bonus to the State."

The same purpose has been accomplished in some other States by statute or by legislative rule, but there is here nothing like the general application of the idea that is found in England and her dominions. It is a regular source of revenue in all English commonwealths, and is duly accounted for as such. For instance, the receipts from this source in Ontario in 1908 amounted to \$9,833 50, in Manitoba in 1907, to \$2 800, in British Columbia in 1909, to \$12,120. The rules of order of the

Manitoba Assembly require a fee of \$100 for a bill not exceeding ten pages, with \$10 additional for each page over that number.<sup>1</sup>

Undoubtedly the origin of the prejudice against the system in the States is to be found in colonial experience. Fees were met in every nook and corner of English administration in the time when our forefathers were at the mercy of the Board of Trade. To get their private acts confirmed, they were on numerous occasions frankly told by the Board that they must pay fees. In the matter of public laws, too, the judicious use of money frequently hastened action. In 1732 the agent of Rhode Island warned his constituents that the passage by Parliament of a pending bill obliging the colony to submit its laws to the Privy Council would entail a great expenditure of money yearly at the Council Office and the Board of Trade, "to get acts through here, in fees for Petitions, Reports, References and Royal Orders, besides the tedious delays that may happen." Penn asked the government of Pennsylvania for "fifty guineas, if not one hundred, to get a favorable report" upon a large collection of laws, and later he wrote that the report of the Attorney General was held up for want of a large fee to him. Bellomont wrote the Board in 1698 that 28 merchants of New York had contributed 100 pounds for use in obtaining the royal approval to an indemnity bill. Later he reported that on the third reading of a bill at the council a member declared there would be 40,000 pounds available "to stop the King's approbation in England." This Bellomont considered "so abominable a reflection on the Government of England, but so common a one here," that he ventured to suggest that their lordships should "put all imaginable discountenance upon it." It is safe to say that the expense involved irritated the colonists, contributed materially to their dislike for the English control over legislation, and led them to think the fee system undemocratic.<sup>2</sup>

Apart from inherited prejudice, the basic theory of the fee system does not appeal to Americans. They feel that justice ought to be as nearly free as possible, and though private bills often savor more of privilege than of justice, they either think

<sup>1</sup> Henry Ford Jones, "American and Canadian Political Methods," *No Am. Rev.*, November, 1911.

<sup>2</sup> E. B. Russell, "The Review of American Colonial Legislation by the King in Council," *Col. Univ. Studies*, vol. LXIV, 219-21.



it impossible to discriminate or do not care to discriminate. They assume that every law has a public benefit, however remote, or else it ought not to have been enacted, and they think individuals ought not to have to pay for a public benefit. Yet nominal fees, corresponding to those in trial courts, to which we have long been accustomed and to which few demur, would in the belief of some who have had much legislative experience, work no real hardship and would choke off a great deal of trivial petitioning.

#### PRELIMINARY INVESTIGATION

One feature of our judicial procedure might be easily applied to special legislation without antagonizing any prejudice or interfering with any mental habit, and to the great benefit of Legislatures and lawmaking. We are accustomed to seeing the courts aided by auditors, masters in chancery, referees, and the like. Why should not Legislatures likewise secure preliminary investigation and exact information? At present if any statement of alleged facts comes to a committee of Legislature or Congress, it is known to be *ex parte* and is viewed with corresponding suspicion and indifference. This devolves on the committee the need of determining facts that might have been determined in advance, saving the time of the committee and conducing to accuracy. Departments of Justice, Federal, State, and local, have of late with growing frequency called in the help of special investigators, usually capable lawyers, who seem to be found of great service. No reason suggests itself why legislative committees should not resort to similar aid.

For most of their needs, however, information agencies are already at hand, in the Departments, Bureaus, and Commissions concerned with nearly every topic of legislative inquiry. The tendency to turn to them is already apparent. Governor Ammons of Colorado said to the Governors' Conference in 1914: "In the National Capital it is utterly useless to expect a bill to pass unless it is first approved by some department. The President cannot look over all the matters, and therefore, as a matter of course, bills, anyhow relating to the West, subjects in which we are interested, can get no consideration whatever until after they have been referred by the committee to certain departments and the O K of those departments secured." In this the Governor confused somewhat the executive and legislative re-

sort to Departments, but the principle is the same whether a committee or a Chief Executive is to pass judgment. In either case information and opinion are sought. The Governor speaks of this as if it were objectionable. It seems to me highly commendable. The Departments should be the eyes and ears of any Chief Executive, of course with exceptions, for no chief ought to be the slave of his aids. The Departments should equally serve Congress or Legislature, for who can better judge or inform than those whose daily work it is to be masters of the matters within their purview?

The principle commended itself so much to the Massachusetts Committee on Legislative Procedure in 1915 that it recommended the adoption of rules requiring all petitions for increase of salary to be approved, in the case of a head of a department by the Commission on Economy and Efficiency, and in the case of subordinates by the head of the department, together with an endorsement of approval or disapproval on the part of the Commission on Economy and Efficiency, every petition for a pension, special compensation, or an annuity to be approved, in the case of a State employee by the head of the department, in the case of a county employee by the county commissioners, and in the case of city or town employees by the mayor in cities, and by the selectmen in towns, petitions for increase of salaries of clerks and assistant clerks of courts to be approved by the county commissioners, petitions relating to matters under the jurisdiction and control of any State board, department, or commission to be filed with such board, department, or commission at a seasonable time before introduction into the Legislature, and petitions relating to matters under the jurisdiction and control of any metropolitan board or commission or the Directors of the Port of Boston to be presented to them for their approval, examination, and report four months before the convening of the General Court. It is not to the credit of the Massachusetts Legislature that it has not yet adopted the rule.

The New York Commission to Recommend Changes in Methods of Legislation (1895) likewise advised that with reference to every bill affecting any department of the State government, or the general administration of the law subject to the supervision of such department, notice thereof should be given to the head of the department having the administration of such subject

under his supervision, and an opportunity afforded him to be heard before the bill should be reported or passed.

A standing order of Parliament requires that all private bills relating to subjects within the jurisdiction of the Local Government Board be referred to it for consideration and report. If omissions or undesirable provisions are noted, the fact is reported to the select committee considering the bill, and almost invariably the recommendations of the board are adopted. Parliament in turn follows the decisions of the select committee, and thus the beneficial results obtained are directly traceable to the position of the Local Government Board<sup>1</sup>

In mere matter of working detail, systematic preparation ought to get far more attention from legislative committees. Of late, Boards of Directors of corporations, Chambers of Commerce, all sorts of organizations, have awakened to the convenience and utility of typewritten data, reports, orders of business, agenda, and the like, in hand at the opening of meetings. The secretary and the typewriter have quietly worked a revolution in the methods of conducting business by small groups of men. When the new idea at last forces its way into the committee rooms of legislative bodies, a not insignificant step will have been taken in systemizing special legislation.

Another step that looks unimportant, might be of some consequence through its psychological effect. It is the English plan of a separate classification for private bills. J. David Thompson, Law Librarian of Congress, in a paper before the American Political Science Association, December 30, 1913, said in discussing the printing of bills in Congress: "At the present time these are numbered separately as introduced whether they are public or private, general, local, or special, in one series for each House. A desirable change would be to separate public from private bills and number each class in a distinct series. No administrative difficulties stand in the way, because a distinction is now made in the printing law by which a smaller number of copies is struck off in the case of private bills. . . It would segregate for separate treatment at least eighty per cent of the bills now introduced."

If segregation should get lawmakers into the way of thinking general and special bills are to be treated differently, it would be no small gain. However, segregation is not so simple a matter

<sup>1</sup> M. R. Maltbie, "The English Local Government Board," *Pol Sc Qy*, June, 1898

as it seems. In 1915 Massachusetts began publishing the laws annually in two volumes, one of "General Acts," the other of "Special Acts and Resolves." The experiment was abandoned in 1919, partly because of the confusion made by two indices, partly because of the difficulty in deciding which were general and which were special acts.

#### NOTICE IN ADVANCE

The requirement of notice of application for special legislation is now found in some measure in all well-regulated States, but as yet is far from adequate. Even a proposal of such evident desirability, has had to fight its way inch by inch. Curiously enough the first Constitution of Pennsylvania, instead of recognizing the importance of publicity for special bills, distinctly restricted the requirements for printing and delay, to "bills of public nature." The section, however, was dropped in 1790. The real need was clear to that political pioneer, Thomas Paine, who had been clerk of the Pennsylvania Assembly before a whimsical fate took the apostle of American democracy into the National Convention of revolutionary France and made him an English outlaw. After he came back to this country he wrote, in 1805, "Of Constitutions, Governments, and Charters," for the benefit of the people of Pennsylvania, then occupied with the subject of calling a convention to revise their Constitution. "Experience shows," said he, "that matters will occasionally arise, especially in a new country, that will require the exercise of a power differently constituted to that of ordinary legislation; and therefore there ought to be an article in a Constitution, defining how that power shall be constituted and exercised. Perhaps the simplest method, that which I am going to mention, is the best, because it is still keeping strictly within the limits of annual elections, makes no new appointments necessary, and creates no additional expense. For example.

"That all matters of a different quality to matters of ordinary legislation, such, for instance, as sales or grants of public lands, acts of incorporation, public contracts with individuals or companies beyond a certain amount, shall be proposed in one Legislature, and published in the form of a bill, with the Yeas and Nays, after the second reading, and in that state shall be over to be taken up by the succeeding Legislature, that is, there shall always be, on all such matters, one annual election take place

between the time of bringing in the bill and the time of enacting it into a permanent law

"It is the rapidity with which a self interested speculation, or a fraud on the public property, can be carried through within the short space of one session, and before the people can be apprised of it, that renders it necessary that a precaution of this kind, unless a better can be devised, should be made an article of the Constitution. Had such an article been originally in the Constitution, the bribery and corruption employed to seduce and manage the members of the late Legislature in the affair of the Merchants' Bank, could not have taken place. It would not have been worth while to bribe men to do what they had not the power of doing. That Legislature could only have proposed, but not enacted the law, and the election then ensuing would, by discarding the proposers, have negatived the proposal without any further trouble "

In spite of such a sagacious warning, the force of which would everywhere now be admitted, no constitutional protection was afforded, as far as I observe, until North Carolina in 1835 provided by amendment for thirty days' notice before the passage of a private bill. Rhode Island may have remembered Paine's proposal when in 1842 it required that any bill presented for creating a corporation other than for religious, literary, or charitable purposes, or for a military or fire company, should lie over until after another election of members, "and such public notice of the pendency thereof shall be given as may be required by law "

Another generation was to pass before the reform could make real headway. Then the first hopeful step was this recommendation of the New York Commission of 1872: "No private, special, or local bill shall be introduced in any regular session after sixty days from the commencement thereof, without in each case, the recorded consent, by Yeas and Nays, of three fourths of all the members elected to the House in which such bill is offered, and no such bill shall be passed, unless public notice of the intention to apply therefor, and of the general objects of the bill, shall have been previously given " The Legislature did not like this and would not submit it to the people.

In the following year Pennsylvania made it part of her reform program, with the requirement that evidence of the publication of the notice in the locality concerned, should be exhibited in the

General Assembly before the passage of the bill Arkansas copied Pennsylvania the year afterward, Alabama, Texas, and Missouri (substantially) in 1875; Georgia in 1877, Louisiana (substantially) in 1879

New Jersey, imitating the device in 1875, left details to the Legislature Florida, acting in 1885, made the time of notice sixty days. Oklahoma entered the Union with a provision of the same purport, the notice required being of four weeks Alabama in 1901 said the courts should pronounce void every special, private, or local law not affirmatively shown by the Journals of the Legislature to have been passed in accordance with the constitutional provisions.

Some other States have handled the matter by statute or legislative rule, but nowhere within the scope of my observation, to the desirable extent. For instance, the Massachusetts statute requires the publication of notice in the case of petitions for the incorporation or division of cities and towns, the incorporation or amendments of the charter of certain public-service corporations, authority to take water for a water supply, the building of structures over navigable or tide waters, the incorporation of educational institutions or the amendment of their charters The rules of the General Court also require that the committee shall be satisfied of adequate notice in the case of a petition "affecting the rights of individuals or the rights of a private or municipal corporation, otherwise than as it affects generally the people of the whole Commonwealth or the people of the city or town to which it specifically applies" The general precaution in the matter of the rights of individuals, is a dead letter Perfunctory, partial, and wholly inadequate advertising of committee hearings is the only attempt to comply therewith The advertising required by statute in the case of municipal and other corporation matters is almost as unsatisfactory Legislatures, like the courts, are far behind the times in their failure to comprehend that fine-type legal notices buried in the advertising pages of the modern newspaper are not read by any considerable part of the public The waste of money in the present processes of legal and legislative publicity, is a crying shame The same expenditure made by any fairly capable agent with authority to eliminate useless verbiage and to employ modern methods, might easily accomplish ten times the results now secured. Some day Legislatures will have publicity clerks.

The New York Commission to Recommend Changes in Methods of Legislation advised in 1895 the adoption of a system along the English lines. It recommended that all private and local bills, including bills relating to municipalities, should be filed either before the beginning of the legislative session or within thirty days before their presentation to the Legislature, unless the Governor took upon himself the responsibility of making a special recommendation of urgency. Each bill should be accompanied with proof of notice duly published or personally served on every interest which might be affected by such legislation. The petition and written answers partaking of the nature of pleadings in a civil suit, should be filed with the bill and accompany it during the whole of its legislative progress. It was also proposed that every committee should be required to report the private and local bills submitted to it, with the reasons for its action, within a certain number of days.

## CHAPTER XXI

### CLAIMS

A most perplexing class of special legislation is that covering what are commonly referred to as "claims." These include matters of contract and of tort (injury to the person or property of another). They involve not questions of privilege or favor, but of right and wrong

The responsibility of the State, whether monarchy or any other form of government, as well as of corporations public or private, has been in dispute for many centuries and still divides the makers and interpreters of law. On the one hand are those whose views are embodied in the maxim, "The King can do no wrong." On the other hand are those who hold that every wrong should have remedy or redress.

Unfortunately neither side can find unquestionable authority in Roman law, the original source of many of our legal principles. The history of English law shows reversals of opinion and practice. Up to at least the 14th century nobody seems to have doubted the right of the injured subject to get redress from his government. Just when and why this came to be denied, is not clear. Perhaps it was when the Tudors established for a time the doctrine of absolute sovereignty. However, when, in the 17th century, colonists began bringing English law across the water, Englishmen had become accustomed to the theory that the King was incapable of doing a wrong for which a subject could of inherent right obtain redress or relief, and that either was to be had only through the mercy of the sovereign, granted upon prayer. In other words no remedy was inherent in citizenship; a subject might not of right sue his monarch.

The gross injustice that would have often followed was from time immemorial escaped by allowing the subject to petition respectfully that right be done him. His prayer was called a petition of right. Technically no more than a prayer, it has come to be in effect a suit, distinguished only in matter of form. It is a judicial proceeding, tried like other suits, and the petitioner now has the privilege of instituting his proceeding in any of the superior courts. The remedy, however, is open only in a certain



definite class of cases. Not until 1874 was its extension to the general field of contract approved by an English judge, and it has not yet reached the field of tort, though approaching it in mixed cases of contract and tort when handled by clever and subtle counsel

Another recourse is that of suit against a Minister or official in his private capacity when damages are claimed for wrongful acts even when such acts were performed by such a person in his official capacity.

Upon inquiry, G. F. M. Campion, Clerk Assistant of the House of Commons and author of an excellent "Introduction to the Procedure of the House of Commons," informs me the fact that a remedy is available at law would generally prevent action being attempted in the House. Where, however, there is no ground for legal action, but a so-called "moral claim" to compensation, action might be taken in Parliament, probably in the House of Commons, where most of the important Ministers sit. Such action would be aimed at putting pressure upon the Government as leaders of the House and bound by their position to pay attention to the representations of any considerable section of that body, at any rate of their own supporters, but it would not be likely to obtain effective backing unless the claim raised some principle wide enough to be considered of general importance.

In such case the question would probably be raised by means of a motion stating that in the opinion of the House it was desirable to take the required action. If it was merely an individual claim without wider implications, action to further it might take the form of raising a debate on one of the occasions — such as Committee of Supply or adjournment of the House — when grievances can be brought forward, or it might take the form of repeated oral questions at "Question Time," to the Minister concerned. In recent years there have been cases of dismissed public servants whose claims have been pressed in this way with great earnestness. Results, however, have not proved these methods to be very efficacious, and it is probable that members who really have the interests of their protégés at heart, find it a more promising procedure to prosecute their claims by means of private, or at any rate extra-parliamentary, representations to Ministers or the permanent heads of departments.

Mr. Campion adds that the departments are in such a strong position and so loath to depart from their precedents, which

cover most of the possible cases, that probably the best course of all is for a claimant with a good "moral" but not an actionable case to throw himself upon their sense of fairness. If this fails, parliamentary support is likely to prove a broken reed.

On the continent of Europe, progress away from the theory that Kings and corporations have no responsibility for injury, although slow, has been fairly continuous from the time when under the Emperors Rome saw its great legal system take shape. Although there are still dissenters among the legal logicians, it may fairly be said that there the theory of an irresponsible state has been rejected. In matters of contract it was incompatible with the development of administrative courts. France has also come to accept that when an administrative act is in genuine relation to the duty of an official, the State may, with some qualifications, be held responsible under the Article of the Civil Code making the principal responsible for certain torts of his agents.

#### IN THE STATES

Colonists are apt to cling more tenaciously to opinions and practices brought with them than the mother country itself. An example appears in matter of language. The French spoken in Quebec to-day is more like that of two centuries ago than is the French now spoken in Paris. The pronunciation of English in our American cities is nearer that heard in London when the Stuarts and Georges ruled than is the speech of Englishmen now. So though we have dispensed with Kings, the greater part of us still insist that "the King can do no wrong."

Inexplicably and unfortunately, while holding for the most part to the rigor of a harsh, cruel doctrine, we have not resorted to the avenue of escape furnished by the English petition of right. Only of late, and then hesitatingly, reluctantly, inadequately, have we made some headway toward justice by letting injured citizens resort to courts or administrative officials.

Delay in this may in part be traced to the temper of the people aroused and shaped by a momentous controversy that brought to the Supreme Court its first great problem. It was in 1793, but four years after the Constitution was adopted, in the case of *Chisholm v. Georgia* (2 Dall 419-1793) that our highest tribunal held a State could be sued in the Supreme Court by a citizen of another State. Indignation grew almost to fury. Of what value

had been the War of Revolution if the new States were not sovereigns? If a sovereign could be haled into court by a citizen of another sovereign, what became of independence?

Such questions led quickly forthwith to the first of the amendments to the Constitution after those known as the Bill of Rights. In January, 1798, the President informed Congress that the 11th Amendment had been adopted by the constitutional number of States. It declared that the judicial power of the United States should not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State. Nevertheless any reasonable man who to-day reads the powerful opinion by Chief Justice John Jay will find it hard to contest his view that such extension of the judicial power was wise because honest, and because useful; because it recognized and strongly rested "on this great moral truth, that justice is the same whether due from one man to a million, or from a million to one man."

Since then various decisions have somewhat lessened the scope of the hardship wrought by the 11th Amendment, and though it is still the case that a State cannot be directly sued, save with its consent, none of its officers or agents can now justify wrong to individuals by pleading the authority of the government when such authority is illegal.

The argument against governmental responsibility is largely technical. Should the principal of an agent who has no legal authority to commit torts, be held to account because the agent has abused his agency or office? We have indeed gone part way in answering that in the affirmative and so departing from the doctrine of *ultra vires*, but are we called upon to go in this direction the whole distance?

Next, may one of the people sue the unit of which he is a fraction? May a partner sue the partnership? Manifestly not, say the theorists, he would be suing himself. So when a State contracts with one of its citizens and fails of its obligations in some particular, in strict theory it would seem that he may not complain. Furthermore, lacking necessary legislation, there is no way in which a judgment against the sovereign or government can be enforced. A legislature cannot be compelled to make necessary appropriation. For years Congress has refused to pay what are known as French spoliation claims although

they have been adjudged valid by the Court of Claims. *Mandamus* will not lie against Congress or the Treasury. In the view of Justice Holmes there can be no "tort" by the State when there is no remedy against the State.<sup>1</sup>

Justice Holmes held that "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends"<sup>2</sup> In the *Western Maid* case later he drew the conclusion that as the United States had not consented to be sued for torts, it could not be said that in a legal sense the United States had been guilty of a tort

On the other hand some of our Justices have given more weight to equitable considerations, to the factors of right and fairness Thus in *Langford v United States* (101 U S 341-1879) the Supreme Court declared that the maxim, "The King can do no wrong," has no place in our system of government. In *United States v Lee* (106 U S 196-1882) Justice Miller said "As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests" Many years before that, in *Chisholm v Georgia* (2 Dall 419-1793) Chief Justice John Jay had said: "I wish the state of society was so far improved and the science of government advanced to such a degree of perfection as that the whole Nation could, in the peaceable course of law, be compelled to do justice and be sued by individual citizens" To my mind that ought to be the sentiment of every fair-minded man.

Our fathers, refusing or at any rate neglecting to incorporate the English petition of right in their practice, directed complainants to address themselves to the representative of sovereignty, the Legislature. Answering petitioners who sought compensation for injuries due to the various operations of government, became an important and irksome part of legislative work It was judicial in nature, but an exaggerated respect for theory, an unwillingness to abandon a prerogative, selfish pleasure in the exercise of power, and fear that justice meted out by the courts would be costly to taxpayers, combined to impede for many years the evident and righteous remedy Even yet it is

<sup>1</sup> *The Western Maid*, 257 U S 419 (1922)

<sup>2</sup> *Kawananakoa v Polyblank*, 205 U S. (1904)

incompletely applied. Nothing would seem more reasonable than to turn over to courts the adjudication of claims. Nevertheless four States (Alabama, Arkansas, Illinois, and West Virginia) still say in their Constitutions that the State shall not be made a defendant. Hundreds of claims that ought to be sent to the courts are still every year handled by Legislatures. And they notoriously clog Congress.

In this matter Virginia set an example that might well have been more widely and rapidly followed. Said Justice Bouldin in *Higginbotham's ex'x v. The Commonwealth*, 25 Grattan 627 (1874). "It has been the cherished policy of Virginia to allow to her citizens and others the largest liberty of suit against herself, and there has never been a moment since before October, 1778 (but two years and three months after she became an independent State), that all persons have not enjoyed this right by express statute." Pennsylvania in 1790 concluded that the subject was important enough to be imbedded in her Declaration of Rights, saying: "Suits may be brought against the commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct." Delaware clothed the right with like dignity two years later. Authority to the legislative body thus to make provision has been the favorite way of handling the matter, a score of State Constitutions so now providing.

Massachusetts saw the light in 1879, a year and a century behind Virginia. The circumstances of her conversion are instructive. Governor Talbot told the Legislature: "There is an increasing source of annoyance and delay in legislation, and some means should be devised to relieve the General Court of questions that should be properly settled elsewhere." He advised that the Superior Court, sitting without a jury, should pass on claims, and so it was enacted, with the provision that three Justices should sit in the case of claims for more than \$1000. The statute restricted the jurisdiction to claims founded on contract for the payment of money. This worked so well that eight years later the scope of the power was extended to "all claims against the Commonwealth, whether at law or in equity." Said Governor Ames in his inaugural address of the following January: "If this legislation is borne in mind, the Legislature will find much relief, as under it some of the most vexatious of matters that have formerly come before the Legislature will go to another tribunal for settlement. Moreover, this will tend to

shorten legislative sessions To secure this most desirable result, it will be necessary for the Legislature to adhere formally to the rule that all cases within the jurisdiction of the court must go there for determination and that the Legislature will not thereafter take cognizance of them "

The Legislature did bear the act in mind and claims began to interfere less with its work Full relief, however, was blocked by the decision of the Supreme Court in the Murdock Parlor Grate case (152 Mass 28-1890) to the effect that the words of the statute could not be construed in the popular sense, but must be taken in the "juridical" sense, excluding torts, on the ground that the Legislature could not possibly have meant to include them (the "King can do no wrong" theory). The Legislature did not revolt against this until 1905, when it provided that the Commonwealth should be liable for injuries to travelers resulting from defects in State highways. In 1908 the requirement for trial by three Justices was repealed A claimant might recover not more than \$1000, nor more than one fifth of one per cent of the valuation of the town in which the injury was received. The settlement of all manner of claims for less than \$1000 was in 1924 turned over to the Attorney General, the Governor and Council to approve his findings If he finds a claimant justly entitled to damages in excess of \$1000, he is to report the facts to the General Court (the Legislature), with his recommendations The result of all this is that claims no longer interfere seriously with the work of the Legislature Nobody in Massachusetts would think of returning to the old system

Nearly a score of State Constitutions have made provision in the matter, mostly after the California fashion — "Suits may be brought against the State in such manner and such courts as may be prescribed by law." Perhaps half the States now permit themselves to be sued in contract Do not suppose, however, that the Legislatures have lost or given away all control Ordinarily the States still insist that the lawmaking body may have the last word, refusing judgments to be paid without legislative appropriation So it has been in Virginia all along The North Carolina Constitution of 1868 took care to specify that the decisions of the Supreme Court "shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action " In Massachusetts, however, the appropriation

is purely perfunctory, no question ever being raised, and probably that is the general rule elsewhere

Wisconsin was more trusting. It directed that judgments should be paid out of the treasury upon audit of the transcript by the Secretary of State. The Nebraska Legislature was equally willing to forego the veto power. The same abnegation has come to my notice in South Dakota and Washington. Perhaps it may be found elsewhere.

The original Virginia statute covered "any right in law or equity" Massachusetts, as we have seen, when broadening her statute extended it to cover likewise claims both at law and in equity. The other States generally speak only of "claims," but presumably this is construed to warrant equitable jurisdiction.

Not so liberal has been the view in matters of tort. Governments everywhere have been very reluctant to admit that they may be held responsible for injuries committed by their servants. Slowly they have been forced by changing conditions to put justice ahead of theory. When municipalities embarked upon enterprises with a profit-making element, such as water-works, sewers, and lighting plants, the courts began to admit that sufferers from the accidents of operation ought to be reimbursed by use of the ordinary processes of the courts. Recognition of the principle spread upward, but not without stubborn resistance. For example, note what the Massachusetts Supreme Court said in the *Murdock Parlor Grate* case. "The object of the statute cannot have been to create a new class of claims for which a sovereignty has never been held responsible, but to provide a convenient tribunal for the determination of claims of the character which civilized governments have always recognized, although the satisfaction of them has usually been sought by direct appeal to the sovereign, or, in our system of government, through the Legislature." This was reaffirmed in *Nash v. Commonwealth*, 174 Mass. 335 (1899) and *Burroughs v. Commonwealth*, 224 Mass. 28 (1916). Nevertheless, with all due deference to a court for which I have the highest respect, my own judgment is that the lawmakers might reasonably have been assumed to mean what they said, even taking the words in the colloquial sense. Very few members of a State Legislature ever draft a bill or vote on it with other than the ordinary, everyday purport of language in mind.

California in 1893 guarded against such technical and narrow

construction by enacting that persons with "claims on contract or for negligence against the State" might sue, and this has been copied by Arizona Illinois has elaborated like authority by empowering its Court of Claims "to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State, as a sovereign commonwealth, should in equity and good conscience, discharge and pay " It is not rash to prophecy that in time this will be the attitude of all the States The sooner the better

The Illinois Court of Claims, consisting of a Chief Justice and two judges, accomplishes judicial results in spite of the constitutional provision that the State "shall never be made defendant in any court of law or equity " The statute says the General Assembly shall make no appropriation to pay any claim or demand within the jurisdiction of the Court of Claims unless the court has made an award therefor. To be sure, the Assembly may refuse to appropriate after an award, but this possibility is negligible.

Several other States have in one fashion or another sought to get independent scrutiny of claims before legislative appropriation The first to do this, as far as I have observed, was Nevada. At the start (1864) Nevada made the Governor, Secretary of State, and Attorney-General a Board of Examiners, with power to examine all claims against the State (except salaries or compensation of officers fixed by law), and forbade the Legislature to act until after this Board had acted. Montana and Idaho copied this in 1899.

The rejected Constitution of New York in 1867 would have created a court of claims composed of three judges appointed for terms of five years by the Governor and Senate, with power to hear and adjudicate claims submitted to it under general laws, and prescribing certain details of procedure, also providing for a solicitor of claims to represent the State in all matters before this court By reason of the State ownership and management of canals, a special need arose that was met in 1870 by committing to a Board of Canal Commissioners the determination of claims relating to canals. For other claims against the State the Legislature, in 1876, created a Board of more general jurisdiction, called the Board of Audit, consisting of the Comptroller, the Secretary of State, and the State Treasurer. These two boards were in 1883 merged into a more independent



Commission, called the Board of Claims, consisting of three commissioners, two of whom must be counselors of the Supreme Court. An appeal from the awards of this board lies to the Court of Appeals. The awards are reported to the Legislature, and require a special appropriation to become payable; so that now, as before, the final disposition of claims against the State depends upon legislative action. It was plainly the intention of the Legislature, however, to assimilate the powers and proceedings of the Board of Claims to those of a regular court, and the necessary appropriations are made as a matter of course and without a re-examination of the merits of the respective claims.<sup>1</sup>

Maryland said in 1867: "The General Assembly shall appropriate no money out of the Treasury for payment of any private claim against the State exceeding three hundred dollars, unless said claim shall have been first presented to the Comptroller of the Treasury, together with the proofs upon which the claim is founded, and reported upon by him."

Nebraska said in 1875 "The Legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the Secretary of State before any warrant for the amount shall be drawn. *Provided*, That a party aggrieved by the decision of the Auditor and Secretary of State may appeal to the district court."

Michigan in 1908 made the Secretary of State, State Treasurer, and Commissioner of the State Land Office a Board of State Auditors, who were to examine and adjust all claims against the State not otherwise provided for by general law.

#### COURTS AS A RECOURSE

The serious objection to most of these devices is that Boards made up of State officials present no guarantee that any of their members shall have any judicial qualifications. Such men have not been elected or appointed with any regard to legal training. Their main duties are of a nature foreign to that of passing judgment upon contested issues. This defect is not found in a Court of Claims, or a Board that is essentially a court, but in most of the States there is not enough litigation of this class to warrant an independent organization. In by far the greater

<sup>1</sup> Ernst Freund, "Private Claims against the State," *Pol Science Q'y*, VIII, 629

number of the States the work could best be handled by the usual courts.

Why has it not been turned over to them?

Perhaps the chief reason is the fear that if the courts were thrown open to suitors having claims against the State, the amounts awarded would be much larger than a Legislature would grant. No complaint on this score is ever heard to-day in Massachusetts. The people feel that what the courts give is just, and so feeling would not listen to any taxpayer mean enough to complain. Therein your sociologist may find a knotty problem. Why is it that the people acting through their representatives will be stingy, unjust, indifferent, cruel, but acting through their judges will be honorable, considerate, and fair?

Simon Fleischmann, addressing the New York Bar Association in 1910, thought the experience of New York had proved the fear of excessive awards to be unfounded. As he viewed it, the chief virtue of the tribunal and its procedure lies in the fact that every suitor has his day in court, with reasonable promptness, and his claim has legal, capable, and impartial investigation, with the right to the defeated party to appeal to the highest court of the State, and the certainty of receiving payment for such amount as the courts finally allow. "Above all, the Empire State thus sets the worthy example of reposing the same confidence in its own courts as it demands of its citizens." Mr. Fleischmann thought no special court of claims or other special tribunals should be created at all for the enforcement of private claims against the State, but that this jurisdiction should be conferred upon the existing courts of record of each State, which are deemed sufficient for controversies, unlimited in amount or consequence, between citizens or private corporations.

The States have naturally hesitated to turn over to courts or other tribunals any claims but those that if made by one individual on another would be determined in a court of law. In *Cole v State*, 102 N.Y. 48 (1886), the Attorney-General argued that the constitutional prohibition against the auditing or allowance by the Legislature of any private claim or account against the State, was intended to prevent payment of any claim unless it was founded on a legal liability. The court could not accept this view, but held that the Legislature might give the Board of Claims or other tribunal power to hear and determine claims against the State, founded in right and justice. It may be pre-

dicted that in the course of time the pressure of other work on our lawmaking bodies will gradually incite them to turn over to courts or other tribunals not only the determination of right, but also the exercise of judgment in the borderland of law.

The legislator well knows yet another class of claims — those beyond the province of either common law or equity, those fundamentally appealing to charity, or, as in the case of many petitions for pensions, those with patriotic considerations uppermost. They are matters of sentiment rather than of right. It is useless to say they ought to have no standing. So long as men are human, so long as gratitude, sympathy, pity are deemed honorable motives for action, legislators, thank God! will defy the logician and will do what conscience rather than reason tells them is fit.

Of course this is dangerous doctrine. It may be perverted to cover inexcusable appropriation of the public funds. Yet on the whole the people do not suffer from it enough to outweigh the benefit coming from acknowledgment that a government may be safe and yet not false to the instincts of humanity.

It is generally believed that safeguards are necessary, that there must be limits which generosity shall not transgress. For a long time reliance was placed on the self-respect and good sense of legislators, with the courts in the background ready to enforce the constitutional principle that the money of the taxpayer shall not be applied to a private purpose. With the decadence of public morals that marked the middle of the last century, States began to think it necessary to have more definite restraints. In this particular field Texas may have made the start, as far as constitutional provisions go, by telling the Legislature in 1845 that it should not "grant, by appropriation or otherwise, any amount of money out of the treasury of the State to any individual, on a claim real or pretended, where the same shall not have been provided for by pre-existing law." Iowa in 1846 said, "nor shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws"; but left open a big loophole by adding, "unless such claim be allowed by two thirds of the members elected to each branch of the General Assembly." Michigan in 1850 found new phraseology "The Legislature shall not audit nor allow any private claim or account." Ohio in 1851 copied Iowa.

In the same year Indiana, when authorizing provision to be

made by general law for bringing suits against the State, declared that no act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, should ever be passed Oregon copied this in 1857. Illinois shut the door tight in 1870 "The General Assembly," it declared, "shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law" West Virginia in 1872 forbade "the payment of any claim or part thereof, hereafter created against the State, under any agreement or contract made, without express authority of law, and all such unauthorized agreements shall be null and void"

By amendment in 1874 New York provided "The Legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law" The proposition had been in the rejected Constitution of 1867 The wording of 1874 proved inadequate and the Convention of 1915 attempted further remedy, which in its Address to the People it explained as follows "We have extended the classes of private or local bills which the Legislature is prohibited from passing so as to embrace bills granting to any corporation, association or individual the right to prove a claim against the State, or against any civil division thereof, and bills authorizing any civil division of the State to allow or pay any claim or account. We have forbidden the Legislature to audit or allow any private claim or account against the State or a civil division thereof, while authorizing it to pay such claims and accounts against the State as shall have been audited and allowed according to law" <sup>1</sup> With all the other proposals of the Convention, this went by the board

To guard against the abuse of stale claims New York provided in 1874 "Neither the Legislature, Canal Board, Canal Appraisers, nor any person or persons acting in behalf of the State, shall audit, allow, or pay any claim which, as between citizens of the State, would be barred by lapse of time," unless duly presented within the time allowed by law, and prosecuted with due dili-

<sup>1</sup> N.Y. Conv Doc No 54, p 5.

gence. Wisconsin by amendment in 1877 provided that no appropriation should be made for any claim against the State, except claims of the United States, and judgments, unless filed within six years after the claim accrued

Kentucky in her Constitution of 1900 provided: "The General Assembly shall neither audit nor allow any private claim against the Commonwealth, except for expenses incurred during the session at which the same was allowed, but may appropriate money to pay such claim as shall have been audited and allowed according to law" Other States have acted until now nearly half forbid the payment of claims "without previous authority of law" or described to like effect.

Nevertheless claims continue to make trouble. In the States where the Legislature is absolutely forbidden to pay any or certain classes of them, they furnish many an instance of gross wrong unredressed In the States where the Legislature may still be burdened with them, they bring all the evils of special legislation Mr. Fleischmann was within bounds when he declared that the intrigue, favoritism, and lobbying inevitably connected with the allowance of claims by a Legislature, constitute most demoralizing influences and should be avoided on the plainest and highest principles of public policy They have always been the source of political scandal, wherever allowed or practiced

George M. Davie has given a graphic description of what takes place "To arrive at justice where the State sues an individual," he says, "there is provided the learned and unbiassed judge, the dignified court, full of notice to both sides, the introduction and analysis of the evidential facts, a deliberate and impartial trial, and an appeal to a full bench to correct possible errors But when the claim is one by a citizen against the State, all is changed A session of the Legislature must be awaited, the claim must be introduced as a bill, it must be referred to an untrained committee of accidental composition, no time, place, or rule is fixed for the preparation or introduction of evidence, there is often but a hurried, gossipy, and not very dignified discussion, perhaps without notice to the other side, neither learning nor impartiality is required, and the bill is thus 'put through,' or 'sat upon,' or 'pigeon-holed' (to use the technical term of the system), according to the activity of the lobby, the distribution of influences, or as fortune may be for or against it. Be-

sides, in legislative trials of a claim, nothing is final. If the lobbyist is defeated, he has but to 'hang on,' taking the time of successive Legislatures, until the death or scattering of opposing witnesses, or a careless committee, or other accidental circumstance shall at least enable him to slip through his bill." <sup>1</sup>

### IN CONGRESS

Criticisms of the same sort have with equal warrant been aimed for many years at the treatment of claims by Congress. Nearly a century ago the situation had become so serious as to demand remedy. In 1848 Representative J. N. Rockwell, reporting for the Committee on Claims, stated that of 17,357 private claims presented within ten years, 8948 had never been acted upon, and but 910 had passed both Houses. Things had reached such a pass that it was said only the impecunious or the corrupt could afford to have dealings with the United States.

It is to be feared, indeed, that knowledge or suspicion of corruption was one of the causes that led Congress in 1855 to create a Court of Claims. At first its help was of small consequence. If it approved a claim, it drew up a bill which was laid before Congress. The Committee on Claims felt bound to re-examine each case on its merits, thus reducing the work of the court to the level of a mere preliminary inquiry. Some gain was made in 1863 when two judges were added and the court, clothed with full judicial powers, was made part of the judicial system. Three years later the Supreme Court recognized it as a court from which appeals might be taken. The next step was that made by the Bowman Act in 1883, under which either house of Congress, or any committee thereof, might refer to the court any claim or matter requiring investigation or determination of facts. The court was not to enter judgment but to report its findings. Jurisdiction did not extend to Civil War claims or claims barred by law, yet the act led to the reference of a large number of claims not arising from contracts or statutes.

The gain thus achieved, even if not momentous, induced Congress four years later by the Tucker Act to broaden the opportunity for relief. This act authorized the beginning of suits not only in the Court of Claims, but also in the United States District Courts, everywhere, on all claims founded upon

<sup>1</sup> "Sung the State," *Am. Law Review*, Sept.-Oct. 1884.

the Constitution or any law of Congress, except for pensions; or upon any regulation of the Executive Departments, or upon any contract, express or implied, with the Federal Government, or for damages in cases not sounding in tort, in respect to which claim the party would be entitled to redress against the United States, either in a court of Law, Equity, or Admiralty, if the United States were suable (except war claims, or claims previously rejected or reported on adversely by any court, department, or commission) All such suits are to be begun within six years after the cause of action accrues No jury is allowed in any case Actions are to be brought by petition United States attorneys are to accept service and defend the United States Proceedings are to be governed by existing law. No judgment by default is to be rendered Appeals are allowed as in other cases Judgments are to be reported to Congress, whose sole duty is to pay them. The court cannot issue an execution to enforce its judgments Money may be drawn from the treasury of the United States only to meet appropriations made by Congress. Each Congress appropriates a lump sum to satisfy any judgments that have been or may be rendered by the court, should this provision be omitted in any appropriation bill the judgments of the court could not be collected

This court also has one function that contains the germ of what may sometime be an important feature of administration. Not only Congress or any of its committees may refer to the court any question of fact for inquiry and report, but also the head of any of the great executive departments may, in dealing with any claim against the government, if the claimant consents, refer questions, whether of fact or law. The court must then report back to him its findings and opinion The advantage of this over a mere inquiry addressed to an Attorney-General, is evident.

The court has no equity jurisdiction and therefore may not decree specific performance of a contract or the restitution of property, but it meets in part this defect by making a rather liberal use of the doctrine of *quasi* or implied contracts. For instance, it has held that if the government uses land to which it asserts no title, there is an implied contract to pay. Likewise its exclusion from the field of torts is modified by liberal construction, but without anywhere nearly accomplishing the results that seem to me desirable. What valid reason is there why

the nation should not be sued in tort? If with gross negligence the driver of a post-office truck injures a citizen, why should that citizen be denied recourse to other than a committee of a legislative body, sitting perhaps two or even three thousand miles away, dealing out uncertain justice with intolerable tardiness? Scores of such matters absurdly harass members of Congress, who must act as go-betweens. Claimants justified beyond question find delay and vexation added to their sufferings. Nobody gains and everybody suffers loss, even, in my judgment, the taxpayer, in the long run.

Evidently the Court of Claims still fails to meet the need. Within five years after the passage of the Tucker Act there were no less than 6931 claims and relief bills on the files of the two Houses. They continue to impede and annoy, a serious detriment to the efficiency of Congress. Their number makes it impossible for committees to handle them adequately. The House Committee on Claims pursues the policy of parceling them out, each member being a sub-committee to examine those given to him, and the rule is that each member may in his turn report to the full committee but one bill, for no more can be handled. This leaves the work always far in arrears.

When at last a committee makes a favorable report, getting rid of it by enactment of law is a matter of chance. The needs of the situation led the House in the 62nd Congress to set aside Fridays of each week for the Private Calendar. In large measure this proved a vain device. The leaders did not hesitate to take Fridays for appropriation bills and measures brought in under special rules. Only a few Fridays of each session were actually devoted to the Private Calendar. Occasionally when work lagged, some other day of the week was given to private bills. Toward the end of a session two or three evening sittings were accorded to them. The procedure in the House was disheartening. Only bills "unobjected to" could be considered. This meant that one member could block action.

The situation became so deplorable that in 1932 through the efforts of Representative Arthur H. Greenwood, of Indiana, the rule was so changed that on the first call of a private bill its immediate consideration could be prevented only by three objectors. If then blocked, it was to have preferred position when the Calendar should next be called, and be taken up under the general rules, but with limited debate. When this was put to the



test, opportunity for filibustering developed and by use of unanimous consent the old practice was resumed <sup>1</sup>

A second attempt at reform started two years later when Representative William B. Bankhead, of Alabama, Chairman of the Committee on Rules, appointed a sub-committee to study the problem. Under the leadership of Representative John J. O'Connor, of New York, and after much deliberation, with opinion secured from many members of the House, the Committee on Rules recommended and the House decided that in case of objections by two members on the first call of a private bill, it should be automatically returned to the committee by which it had been reported. Not embodied in the rule but accomplished through agreement, it was understood that the committee would by a sub-committee made up of men who had not previously reported bills, secure a second and independent judgment. If that were favorable, the proposal would then be included with others likewise reapproved in an omnibus bill. Such bills were to have first place on the second of the Private Calendars in each month and be handled like ordinary bills, that is, be debated under the general rules and be open to amendment, but only to reduce amounts, impose limitations, or strike out entirely. Items or matters stricken out were not to be put into another omnibus bill in the same Congress <sup>2</sup>

At this writing the new method has not been working long enough to show whether it will accomplish its purpose. Some members fear it will unfortunately discourage a small, unofficial group made up of men asked by the leaders of both parties at the beginning of a term to undertake the laborious task of examining all the bills on the Private and Consent Calendars in order that if occasion is found objection may be made when they are reached. These men have the always ungracious duty of saying "No." They must expect the wrath of disappointed colleagues. They deserve praise for their willingness to perform an unpleasant, disagreeable public duty.

On the other hand, the dangers and damages of that system are conspicuous. The objector, with no information at command other than what appears in the committee report accompanying the bill or on the face of the bill itself, undertakes to say that hard-working, conscientious committees, helped by clerks usu-

<sup>1</sup> *Cong. Record*, 72nd Congress, 1st session, vol. 75 p. 8807

<sup>2</sup> *Cong. Record*, 74th Congress, 1st session, vol. 79, p. 4642

ally of long experience with the questions involved, have reached wrong conclusions. He may be biased by extraneous considerations — prejudiced, perhaps unwittingly, against the man who introduced the bill or the class (such, for example, as public service corporations) to which the claimant belongs. He may have set up in his mind shibboleths that would not be accepted by the great majority of the members if they had the chance.

The expense of all this is no small matter. It has been estimated that it costs about \$300 to enact a bill. Add to that the value of all the time spent in the committee and in the House itself on bills never enacted, and it may be that money would actually be saved by a more liberal procedure. Of course there can be no appraisal of physical and mental waste, but one thing is sure, that the work of a Congressman has now become so great as to make every saving of strain worth while.

It is particularly to be regretted that so large a part of committee work goes for naught. In the 71st Congress, of the 651 bills reported favorably by the House Committee on Claims, 103 were objected to when reached on the Private Calendar, 133 remained on the Calendar, never having been reached in the House, 109 were in the Senate at the time of adjournment, 3 were vetoed by the President, 303 became laws. The Committee itself actually disposed of 910 bills in one way or another, and took no action whatsoever on 880 more.

Surely this record did no credit to Congress. Worse was the hardship to victims it meant. Here is a postal card sent to me and presumably to all other members:

Dear Representative

If LIFE and HEALTH mean anything to you, PLEASE DO NOT OBJECT TO S. BILL 1725. It is my last hope (after seven years of invalidism and continuous expense brought about by a government auto running down my mother and me in 1917, killing mother) for possible recovery by an immediate operation and many more months of hospital care.

It might be well for members of Congress to refresh their memories by reading Magna Charta once more and giving thought to the pledge wrenched from King John by the Barons: "To no man will we sell, or deny, or delay, right or justice."

The tale is that somewhere in the reports is the history of a

private claim of unquestionable merit, which was passed without opposition ten times by one House and fourteen by the other, and yet never succeeded in getting through both Houses of the same Congress. A large proportion of the causes become hoary and venerable. Speaker Reed suggested that constitutional provision forbidding the consideration of any claims that had been outstanding more than ten years, would not only clear off stale claims, but would remove the temptation to waste lives and hopes in chasing the will-o'-the-wisp of congressional justice; energies which could have made new fortunes had too often been spent in vain pursuit of decisions of Congress that would never be obtained.

The very suggestion is in itself a wretched commentary on the inefficiency of Congress and the inhumanity of a republic. Note that it takes no account whatever of justice. Simply because right has not in many anxious years been determined, or determined has not been done, the victim is to be swept aside. It may be that a great part of these claims are not founded on injuries justifying redress. It may be that many of the claimants, deluded by false beliefs or even conscious that they have no real grievance, needlessly harass members of Congress. Yet he who accepts the ordinary rules of civic conduct cannot escape chagrin that his country continues year after year to show itself unequal to giving prompt and clear reply to those of its citizens who say they have been wronged.

What is the excuse? Senator Hoar gave it in the days when Mr. Reed was ruling with an iron hand. You go to the Speaker, said the Senator, and tell him that your claim has passed the Senate unanimously ten times; that ten committees of the House have reported in its favor, and you pray him to let your Representative tell the story to the House and ask them to pass it. "He will answer you, that he has no doubt all you say is true, but there are thronging at the gate millions of unjust, corrupt, or extravagant demands upon the Treasury, which the House is eager to pass if it can get at them; and that he does not throw open the door to one honest claimant because, if he should, a hundred dishonest ones would pass in."<sup>1</sup>

Since then the nominal setting aside of one day in the week for the Private Calendar has freed the Speaker from much of the pressure. On the two days in the month when motions to

<sup>1</sup> "Has the Senate Degenerated?" *Forum*, April, 1897

suspend the rules are in order, he will not recognize anybody to move suspension in order to bring up a claim. This relieves him, but does not relieve the general situation.

The basic trouble is that Mr Reed's apprehensions are still entertained by those who control the House. They have been long in the service and have seen so many attempts to defraud the government that they have become sceptical and cynical. They look upon every claimant as guilty until he is proved innocent. If there be one honest man in the horde of rogues, let him suffer. So Justice weeps.

Even granted that hostility ought to be the normal frame of mind, it is not to be overlooked that in our time society has reversed its attitude toward accidents. We have come to recognize they are inevitable. For those that happen in industry we have provided Workmen's Compensation laws, on the ground that the expense they entail should be borne by the community rather than by the victim or his family. Gross, willful negligence we do not condone, but we approach with sympathy, and as a rule in the administration of the laws the victim gets the benefit of a doubt.

Let it not be thought that the problem has received no serious attention from Congress. At the very outset, confronted by the mass of claims arising from the Revolutionary War, it referred the investigation of those for pensions to the circuit courts. Not satisfied with the results, it took back the jurisdiction over pensions and worked out in the course of forty years the system of handling them and other claims through standing and special committees. The defects of that system led to authoritative criticism. Justice Story, in his Commentaries on the Constitution, published in 1833, denying that the Constitution itself was at fault, placed the blame, if there were any, on Congress itself, "for not having provided (as it is clearly within their constitutional authority to do) an adequate remedy for all private grievances of this sort in the courts of the United States."

As we have seen, presently the creation of the Court of Claims with the enlargement of its powers by the Bowman and Tucker Acts, carried out Justice Story's suggestion, establishing beyond dispute to-day the principle that our sovereignty may be sued in the courts and there be held responsible for misdeeds, at any rate in matters of contract. Naturally this encouraged argument for extension of the principle to matters of tort. In

the 50th Congress (1887-89) able reports accompanying a bill for private relief, in the Senate by Senator Hoar and in the House by Representative Lanham, maintained that principle in a case of marine collision. Senator Hoar, while thinking the Government not liable for loss or damage occasioned to private citizens by reason of any imperfection in the performance of the ordinary functions of government, or by reason of the acts, omissions, or negligence of its officers or agents in the discharge of such functions, yet held there were two classes of cases where sound public policy required the United States and all other sovereign Governments to hold themselves responsible. One was where the Government, through its agents, managed or controlled property from which it received a benefit or profit, and the other where it was using or managing property through its agents under such circumstances that these agents mingled on terms of equality with the general mass of the citizens, and the security of the citizens required that the same obligation should rest upon them.

The Senator said Congress had always recognized the obligation of the Government for injuries occasioned by the fault of the officers of its naval and other vessels in maritime collisions. It was not, however, until 1910 that Congress permitted anybody else to share in meeting this obligation. Then it authorized the Secretary of the Navy to adjust claims involving not more than \$500, repeating this in current appropriation acts, and increasing the amount to \$1000 in 1918, then to \$3000 in 1922. Also in 1910 it authorized the Chief of Engineers to adjust up to \$500 collision claims in connection with River and Harbor works, and gave like power to the Commissioner of Lighthouses, extending it in 1920 to the Superintendent of the Coast and Geodetic Survey. In 1914 jurisdiction over burglary cases not exceeding \$10,000 was given to the Post Office Department, and in 1921 it was authorized to settle property damages up to \$500. Like power to settle up to \$500 property damages by vessels engaged in river and harbor work was given to the War Department in 1920.

Much of this must have been done without attracting the attention of House or Senate, for admission of liability in matters of tort struck at least some members as a novelty when in the 66th Congress it was proposed to pay Mrs. Thomas McGovern \$5000 for damages suffered because her husband was fatally

injured by a Government truck driven by an enlisted soldier. To the argument that this would establish a dangerous precedent it was rejoined in the House that in the same Congress it had been voted to pay \$7200 to the widow and orphans of a man killed by soldiers shooting at a mark. The same argument of novel precedent was voiced in the Senate and met by the citation of several Acts of the same character. As early as 1907 \$100 had been voted for the killing of two horses by troops engaged in rifle practice.

By 1922 the sense of justice or the pressure of work or both had so grown that Representative Charles L. Underhill of Massachusetts was able to achieve a notable step by securing the passage of the Small Claims Act known by his name, which gave the Departments power to settle property damage claims up to \$1000. It worked admirably. Within the next four years it saved Congress the task of handling more than 1500 of these small claims. Nobody found reason to complain that it had been unduly expensive or that the Government had suffered any injustice. So Mr. Underhill was emboldened to try to carry the relief farther. In 1926, having become Chairman of the Committee on Claims, he reported for it a bill raising to \$5000 the limit of the damages the Departments might award, giving to the Court of Claims and the District Courts jurisdiction from \$5000 to \$10,000, adding to the jurisdiction of the Court of Claims in matters of contract above \$10,000 that of property damages; and, more important still, bringing in personal and death claims on the same footing, thus definitely establishing the principle of governmental responsibility, even if limited, for all kinds of torts. Jury trial was prohibited, lest the Government might suffer through excessive awards resulting from misplaced sympathy and the tendency of juries to mulct the public.

In the following Congress the bill passed both House and Senate but unfortunately did not reach the President till the end of the term. Mr. Coolidge felt it necessary then to give it a pocket veto because of an amendment inserted by the Senate directing the Comptroller General to prosecute in the Court of Claims, which was deemed to be a function of the Attorney General's office.

Courts and administrative officials need not necessarily be the only recourse. Congress might create a staff of "Examin-

ers," capable, well-paid men working the year round, who would report the facts and the law, with equitable recommendation. Should they by wise conduct win the confidence of Congress to such degree as has been achieved by the Legislative Counsel of both Houses, they could be of great help. When Legislative Counsel were created, there was strong objection on the ground that Senators and Representatives ought to write their own bills, or if unable, have their secretaries do it. Yet inside of a dozen years everybody recognized the great gain that had been made and now nobody would dispense with the legal advisers. The same happy result might follow the delegation of other work.

Another possible recourse was suggested in 1932 by John Q. Tilson, one of the oldest members of the House in point of service and for some years its Republican floor leader, a man wisely conservative by nature, and so with judgment carrying all the more weight. He proposed that a special committee of a dozen members, six from each side of the middle aisle (which divides the major parties), be appointed as a sifting board to sit when the House is not in session, to pass judgment on private bills. Unless two members of the committee objected, one from each side of the political fence, a bill would be reported back to the House and there put on a preferred list for passage. Mr. Tilson's suggestion included all private bills, and not all of them are claims, but as probably nine tenths of them involve payment of money, perhaps it would be well at the start to restrict thereto the work of such a committee. If Mr. Tilson's plan should greatly lessen the time spent in the House on claims, as is to be hoped, there would be that much more opportunity to handle the remaining private bills that come from ten or fifteen standing committees whose judgment would generally be accepted without demur, once the bills were reached.

To my mind, the chief objection to Mr. Tilson's proposal is its requirement that a dozen members of the House work the year round, or at any rate several weeks, possibly several months, more than the rest of the members. This would be a hardship and might endanger health. Occasional service on recess committees is endurable, but such service year in and year out would be avoided, or even refused, by most men. Would it not seem better to turn the work over to salaried men from the outside? A board made up, let us say, of former mem-

bers would have the legislative point of view, and would exercise judgment that the House would be likely to accept <sup>1</sup>

Still another step suggested is return to the system of omnibus claim bills, that is, the combining of many claims in a single bill. This is the method still pursued by committees on Pensions. In practice it results in removing all the work from the floor, for the bills are quickly passed, without scrutiny or amendment. Resort to this method about thirty years ago in the matter of various classes of private bills resulted in a drop from 6940 bills and resolutions passing the House in the 59th Congress (1905-07) to 584 in the 60th. In the matter of claims this procedure was dropped after 1913 because the Senate added so many items the House would not accept. Conferees could not agree and bills died. The difficulty might be met if at least in the matter of claims Congress would apply the joint committee system that has proved so workable and useful in the few State Legislatures where it is in effect. If a joint Committee on Claims presented a united front, serious amendment in either branch might be escaped. At any rate the danger of it would be much lessened. Furthermore one staff of examiners would suffice.

<sup>1</sup> Robert Luce, "Petty Business in Congress," *Am. Political Science Review*, October, 1932.



## CHAPTER XXII

### PURPOSE AND SCOPE OF LAWMAKING

It is charged that too many laws are made. For determining whether the charge be true, it is reasonable first to consider what should be the purpose and scope of lawmaking

Hereon men widely differ. At the root of their quarrels may be found the question of why the State exists. If we turned to the past for the answer, to find whence came the State and why, groping through primeval night we should learn vaguely of the origins of family, tribe, and clan. Then with the dawn of history, coming upon the first of what we think of as States, the cities on the shores of the Ægean Sea, we should find that somehow there had developed the idea that a group of men dwelling together, with common habits, customs, institutions, religion, made up an entity in which all individual interests were merged. Its laws, its government, its life had in mind only the common welfare. Men lived and died for the common benefit. That alone justified their existence. Liberty and freedom did not exist, were not even ideals or hopes. When Rome modified the Grecian theory, it was without essential change in spirit, and she became mistress of the world while holding the State to be supreme, the aim and end of all things mundane. This the very name "republic" attests — the *res publica*, the public thing or affair, first in mind and heart of every Roman citizen.

Yet though the State was the unit, and individuals were but fractions, the relations between these fractions had to be regulated even if for no other purpose than to ensure the tranquillity of the State. A disordered people, quarreling and resentful, could not win against the contented, harmonious forces of a rival. Hence came justice, not because it was an individual right, but because it was a public necessity. Along with it grew the idea of personal property. At first the only property worth the name was that of the family or clan. Gradually men were permitted to keep for themselves some of the spoils of war or the fruits of peaceful labor. Notions of inheritance took shape. Trade grew into commerce and profits were born. These things compelled recognition and regulation of reciprocal rights and duties between individuals.

For some quite inexplicable reason these rights and duties reached paramount importance on a large scale in northwestern Europe, and particularly in England, earlier than anywhere else in the world. To be sure, the Roman jurisprudence wonderfully cared for the rights and duties of citizens many centuries before there was an English jurisprudence worthy the name, but in Rome it never was anything more than a secondary affair, purely subordinate to the public interest. In England, however, at least as early as that fateful meeting between John and his Barons at Runnymede it was successfully maintained that there were human rights superior to those of any monarch. From that day we may trace the growth of individual liberty. It was greatly accelerated by the Reformation and then the Puritan uprising, out of which eventually came freedom of conscience, for although the Church of England was only less intolerant than the Church of Rome, and neither Cavalier nor Roundhead loved his enemy, yet after William of Orange was brought to the throne, rancor mellowed into acquiescence and the eighteenth century saw the right to think accepted as a tenet of English faith.

In the colonies all the conditions of life favored the development of self-reliance. The farmers of New England, the planters of Virginia, alike had to depend largely on their own resources. The frontier bred individualists. After the first few years of each colony there was comparatively little immigration, and by the middle of the eighteenth century far the greater part of the people were native born, without personal knowledge of the State to which they owed allegiance, unawed by the pomp of its Court or the dignity of its Parliament, bound to its traditions and institutions by only fragile ties. The people were ripe for political freedom. The War for Independence was a successful revolt against the State-supremacy idea. Its reaction on the mother country completed there the subversion of royal power. George the Third was the last English monarch. Stubbornly and long though he fought, before his reign was over England too had achieved independence. The Cabinet became uncontestedly dominant and the citizen was enthroned.

The laws kept pace with this march from the welfare of all to the welfare of each. It might seem as if these two things were not far enough apart to make much of a journey, but it required many centuries and covered the distance between ancient and

modern civilization For the starting point take the description of law given by Demosthenes. "The design and object of law is to ascertain what is just, honorable, and expedient; and when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all " <sup>1</sup> Illuminate this with what Aristotle said: "There must be war for the sake of peace, business for the sake of leisure, things useful and necessary for the sake of things honorable. All these points the statesman should keep in view when he frames his laws For men must engage in business and go to war, but leisure and peace are better, they must do what is necessary and useful, but what is honorable is better " Then throw more light on the ancient ideal with Aristotle's complaint of shortcoming "Even the Hellenes of the present day, who are reputed to be the best governed, and the legislators who gave them their Constitutions, do not appear to have framed their governments with a regard to the best end, or to have given them laws and education with a view to all the virtues, but in a vulgar spirit have fallen back on those which promised to be more useful and profitable." <sup>2</sup>

What we observe in the progress of English and American lawmaking is the waning of the "honorable" element that Demosthenes and Aristotle extolled, the waxing of the expedient, the useful, the profitable, and the development of a new conception of justice

The "honorable" purpose of the State, that is, the achievement of national glory, grandeur, and power, did not dwindle perceptibly until the people began to win real control of lawmaking The capacity of a monarch for ambition is far greater than that of a multitude Pride is not a defect of democracies. This may explain the revolution in English thought in the two centuries from Elizabeth, the last of the Tudors, to the third George — from the period when Parliament was at its lowest mark to that when the leaders of its majority, the Cabinet, became the real Government To achieve what the Tudors deemed an "honorable" State, called for very little of what we think lawmaking The ordinances that the Crown could issue by itself, sufficed for maintaining the pomp and prestige of the Court, and there was no need of statutes for the dealings with other nations that then were the most important function of government. The narrow limits of domestic policy are shown by the descrip-

<sup>1</sup> *Orat 1, cont Aristotle*

<sup>2</sup> *The Politics, bk vii*

tion Sir Thomas Smith gives of the work of an Elizabethan Parliament. He specifies that it "changeth rights and possessions of private men, legitimateth bastards, establissheth forms of religion, altereth weights and measures, giveth form of succession to the crown, defineth of doubtful rights whereof is no law already made, appointeth subsidies, tailes, taxes and impositions, giveth most free pardons and absolutions, restoreth in blood and name, as the highest court, condemneth or absolveth them whom the prince will put to trial."

Notice how little suggestion there is here of what we call constructive legislation. Parliament in its first three hundred years and more put forth less of new law than American legislatures enact in a single year. All the statutes of the realm up to the time of Charles I fill but five volumes, and Stimson thinks the laws concerning private relations — private civil laws — could be condensed into a book of thirty or forty pages.<sup>1</sup> It was still the prevailing notion in England, as Sir H. S. Maine declares it is yet over the larger part of the world, that the perfection of law consists in adherence to the ground plan supposed to have been marked out by the original legislator.

Maine found that the rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form.<sup>2</sup> He thought it was a marvelous fate that had exempted from this calamity one or two races, grafts from which have fertilized a few modern societies. Other eminent Englishmen would seem to deny that this exemption has been good fortune. For instance, Sir William Blackstone, patron saint of lawyers, extolling the common law, which is the natural law, the inherited law, the ancient law, roundly condemned statutory innovation. The sentences penned a century and a half ago, begin as if they were taken fresh from the customary editorial criticism printed after the adjournment of a lawmaking body in any corner of the world where English is written. "The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question, and how far they have been owing to the defective education of our senators, is a point well worthy of public attention. The common law of England has

<sup>1</sup> *Popular Lawmaking*, 15

<sup>2</sup> *Ancient Law*, 4th Am. ed., 74

fared like other venerable edifices of antiquity, which rash and inexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence, frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, the delays (which have sometimes disgraced the English as well as other courts of justice), owe their original not to the common law itself, but to innovations that have been made in it by acts of Parliament, 'overladen (as Sir Edward Coke expresses it) with provisocs and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law.' This great and experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators."<sup>1</sup>

This reverence for the original scheme of things has persisted. For instance, you may find it a century after Blackstone wrote, in the conclusions of even so great a student of civilization as Henry Thomas Buckle. He declared that the whole scope and tendency of modern legislation is to restore things to that natural channel from which the ignorance of preceding legislation has driven them. This is one of the great works of the present age, and if legislators do it well, they will deserve the gratitude of mankind.<sup>2</sup> Further he averred that every great reform which has been effected, has consisted, not in doing something new, but in undoing something old. The most valuable additions made to legislation have been enactments destructive of preceding legislation, and the best laws which have been passed, have been those by which some former laws were repealed. To the same end another historian, Edward A. Freeman, has pointed out that of the great political documents forming landmarks in the political history of England — the Great Charter, the Petition of Right, the Bill of Rights — not one gave itself out as the enactment of anything new. All claimed to set forth, with new strength, it might be, and with new clearness, those rights of Englishmen which were already old. "In all our great political struggles the voice of Englishmen has never called for the assertion of new principles, for the enactment of new laws, the cry

<sup>1</sup> *Commentaries*, I, 10.

<sup>2</sup> *History of Civilization in England*, I, 200

has always been for the better observance of the laws which were already in force, for the redress of grievances which had arisen from their corruption or neglect " <sup>1</sup> The same thing might be said about the American Declaration of Independence. It is, however, not true of the present-day political documents to which men pin their faith; and now the great political struggles are everywhere for the assertion of new principles, the enactment of new laws.

This has come about because most men now view the State as primarily a means not only to make secure but also to increase, to promote, to advance the welfare of its citizens. The pendulum has swung to the other end of its arc. The dominant political idea in the world to-day is that which Demosthenes put last and in which Aristotle saw "a vulgar spirit" — the idea of utility and profit.

Germany, the greatest of modern nations to exalt the supremacy of the State, has utterly and miserably failed in her attempt to repeat the glory of Rome. It would have been better for her had she profited by the wisdom of one of her greatest professors, Bluntschli, who showed <sup>2</sup> that the one-sided view of the ancients, which overlooked the individual in the nation, seriously endangered his liberty and his welfare, and led up directly to the conception of the omnipotence, which easily degenerated into the tyranny, of the State. The reaction against precisely that result when the sufferings of the Great War had ripened the peoples of eastern and central Europe for revolt, seems to have justified Bluntschli's further conclusion that the view of the moderns is equally one-sided the other way. Prophetic was his declaration that the view which fails to recognize the majesty of the State, "tends to dissolve it in a confused mob of individuals and to encourage anarchy."

When Bluntschli wrote, it was among English and American authors that he found the frequent expression of the argument for the State as simply a means to secure the welfare of individuals. He observed that Macaulay repeatedly throughout his works maintains the chief defect of ancient politicians and of Machiavelli to be in the fact that they do not, like the moderns, recognize the great principle that "societies and laws exist only for the object of increasing the sum of private happiness."

<sup>1</sup> *Growth of the English Constitution*, 57

<sup>2</sup> *The Theory of the State*, 307

Bluntschli traced back to the time of Bacon the zealous defense of this opinion. Yet whatever the origin or early course of the argument, it can hardly be said to have had practical application until the epoch that saw the American Revolution and the coincident triumph of the Cabinet system.

In this period Adam Smith put forth the book that clarified English political thought and contributed momentously toward the development of doctrine that has brought us to our present pitch. It will be thought paradoxical to suggest that "*The Wealth of Nations*" was a source of the prolific lawmaking of to-day, for we first think of Smith as the father of the theory that the less interference by government, the better. Really, though, no contradiction exists, for behind the non-interference theory was his fundamental treatment of the State as an agency rather than as an end. This is shown by his description of the proper functions of the State. "According to the system of natural liberty," he said, "the sovereign has only three duties to attend to, three duties of great importance, indeed, but plain and intelligible to common understandings: first, the duty of protecting the society from the violence and invasion of other independent societies, secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice, and, thirdly, the duty of erecting and maintaining certain public works and certain public institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain, because the profit could never repay the expense to any individual or small number of individuals, though it may frequently do much more than repay it to a great society."<sup>1</sup>

As a statement of the modern conception of government this has rarely if ever been surpassed. Its classification will serve us excellently as a framework for analysis of present day law-making.

#### FUNCTIONS OF THE STATE

Protecting the society from the violence and invasion of other independent societies is perhaps the oldest of governmental functions. It directly involves, however, little of genuine law. The maintenance of armies, navies, and defensive works is a

<sup>1</sup> *Wealth of Nations*, bk. IV, ch. IX

co-operation that in time of peace touches only the pocket-books of the citizen. When war is engaged, martial law may here and there become supreme, but it is not a source of the statutes about which complaint is made. Also we need not pause for attention to the temporary enactments that war produces in such matters as those of conservation of food or man-power, espionage, trading with the enemy, and the like. More important are the more enduring forms of law that spring out of the need for protection against other societies in times of peace.

One of these we know as a treaty. The Federal Constitution forbids any State to make a treaty, and says that all treaties made under the authority of the United States shall be the supreme law of the land. This complete authority was the subject of much debate both in the Federal Convention and in the ratifying Conventions, so there can be no question that it was intended. The Supreme Court early made it clear, in *Ware v. Hylton*, 3 Dall. 193 (1796), that a treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State Legislature can stand in its way. In the course of time not a few of what had been prerogatives of the States have been over-ruled by the effect of treaties. Of course, however, it is national legislation that is most concerned. In this field the results of the Great War now bid fair to be of the most far-reaching consequence, for they extend well into the realm of economic, labor, and other social legislation.

Besides treaties, two other important sources of law involved in foreign relations may be mentioned — the tariff and immigration. From the beginning of the nation there has been controversy as to how far a tariff should be used for purposes of protection, but for the moment at any rate there seems to be general agreement that it is a question of degree and not of fundamental right. Likewise it seems to be accepted that we may properly protect ourselves against immigrants who threaten our industrial or social welfare.

Smith did not include a form of national protection that has been held to be legitimate from time immemorial and is necessary to the very existence of the State, viz. protection against enemies from within. In time of war little question is raised over the punishment of treason. Much more difficult is the problem of how far the State may go in time of peace. Our colonial ancestors were stern in the matter. Beset by perils, surrounded by



Indian tribes at times fatally hostile, their internal happiness threatened by adventurers, fanatics, other trouble-makers, they seem at the outset to have felt extreme measures absolutely necessary for their preservation. So there is no occasion for astonishment when we read, for example, that in Massachusetts Bay, June 14, 1631, it was ordered that Philip Rathliffe should be whipped, have his ears cut off, be fined forty pounds, and be banished out of the jurisdiction, for uttering malicious and scandalous speeches against the government and the church at Salem<sup>1</sup> For the same reason there should be charity when we read the story of the Quakers in early Massachusetts, of the religious differences in Maryland, or of the revolt in Virginia. As the authority of government became more firmly established, the need for drastic severities disappeared and we find almost an excess of mercy in the outcome of the Shays rebellion in Massachusetts, the Whiskey insurrection in Pennsylvania, the Dorr affair in Rhode Island. Whether in our own day we shall see the State compelled to make new laws in defense against new enemies, revolting against the whole social order, at this writing remains to be seen, but if they prove necessary they are sure to come, for self-preservation is the first law of life for nations as well as for individuals.

Smith put as the second duty of the sovereign that of "protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice."

Note first that phrase, "an exact administration of justice." Therein lies the warrant for lawmaking by enacted statute. The "common" law, the unwritten law, is necessarily indefinite. It is undefined save by judicial decisions. Hidden in the law-books, these decisions rarely come to the knowledge of the masses, and even when known, it is only in a hazy, general way. No reasonable man will question the need of clearness and precision as to at least some of the rules governing social relations. That has been recognized from the time of the earliest records of civilization we have. Hammurabi, who ruled the city-kingdom of Babylon from 2125 to 2080 B. C., proclaimed an elaborate code defining the chaotic mass of customs he found his people observing. From that day to this some measure of written law has been accepted as a necessity. The amount of statutory legislation is matter of degree.

<sup>1</sup> *Records of the Colony of the Mass. Bay in N. E.*, I, 88

Smith's implication that protection is the basic purpose of justice seems to me defensible even though it is not brought out by the dictionaries. At any rate the "Standard" gets no nearer to it than to give among the various meanings of the word justice — "The body of principles by which actions are determined as right and wrong", and — "Reward or punishment according to desert, or in vindication of law or right." This begs the question of what constitutes right and wrong. Will any attempt to answer the question escape the conclusion that conduct is wrong because it injures? The punishment of injury is one way, and not the most important way, in which justice works to accomplish its real end — the protection of individuals. Far greater than this consequential process is the anticipatory process, that of preventing injury. To illustrate, the decision of a supreme court in some cause involving a few dollars or a few acres may be the righting of a very trivial wrong, and yet may establish a principle of law that will afterward affect the conduct of thousands of men in relations involving millions of money.

In such a case the court both administers and creates justice; or if you prefer the familiar theory of the common law, it reveals justice. If it be creation rather than revelation, the court shares the lawmaking prerogative. Surely it does this when it issues a writ of injunction. Then by a special rule it seeks to accomplish what the legislatures are constantly trying to accomplish by general rules, viz to prevent injury to property rights. If for some illogical reason the court refuses to extend its writ of injunction to prevent personal injury, yet it achieves that also after a fashion when it puts a man under bonds to keep the peace. Notice, however, this distinction, that the writ of injunction issues primarily for the benefit of the individual endangered, but the bond to keep the peace is primarily for the benefit of society at large. The history of this distinction would be an interesting study of itself, but here it is unnecessary to go farther than to point out that originally neither the person nor the property of an individual had any rights. Everything existed for the family, the germ of the State. The head of the family had full power over the lives and the possessions of its members, and there was no such thing for them as the lawful protection we call justice.

In the course of ages men developed the idea of individual rights. It may have been that property rights grew faster than

personal rights because through many centuries the nature of warfare made it indispensable that the sovereign should completely control the persons of his subjects, but what they might acquire in the way of individual control of the fruits of their toil was comparatively a matter of indifference. Whatever the cause, it turned out that by the eighteenth century in English-speaking communities the rights of property were not only full grown, but also superior in common regard to the personal rights. Even the leaders among the American colonists who paved the way for the great vindication of the rights of man in the war for Independence, put property first. Thus Samuel Adams, writing for the Massachusetts House of Representatives the letter that it decided January 12, 1768, to send to De Berdt, the agent of the province in England, and declaring in it that "the security of right and property is the great end of government," said in the same document: "It is observable, that though many have disregarded right, and contemned liberty, yet there are few men who do not agree that property is a valuable acquisition, which ought to be held sacred. Many have fought, and bled, and died for this, who have been insensible to all other obligations." And this: "Surely, then, such measures as tend to render right and property precarious tend to destroy both property and government, for these must stand and fall together."<sup>1</sup> Another Massachusetts patriot, John Hancock, as fond of worldly goods as Adams was indifferent to them, did personal rights more honor by placing them on a level with those of property when he said in his oration at Boston, March 5, 1774: "Security to the persons and properties of the governed is so obviously the design and end of civil government, that to attempt a logical proof of it, would be like burning tapers at noonday to assist the sun in enlightening the world."<sup>2</sup>

Thomas Jefferson was less materialistic when in the Declaration of Independence he centered attention on "life, liberty, and the pursuit of happiness." Notice, however, that the words breathe individualism, and lead up to the demand for the protection of individual rights. It was the temper of the times, the mental attitude of all the great leaders of the Revolutionary epoch. In this spirit they fought over and framed their new governments. Said Patrick Henry, criticizing the new Federal

<sup>1</sup> *Mass State Papers*, 125

<sup>2</sup> *Niles, Principles and Acts of the Revolution in America*, 13.

Constitution in the Virginia Convention of 1788. "Of all the various modes and forms of government, that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration" <sup>1</sup> More pithily was it put by Hamilton or Madison, whichever one it was who wrote No. 51 of "The Federalist" "Justice is the end of government. It is the end of civil society." And by justice he meant the protection of individual rights.

It was with this in mind that Bills of Rights were put into several of the earliest Constitutions. So great was the importance attached to them that because the Federal Constitution lacked such specifications, it came very near defeat and in some instances was ratified only on the assurance that by amendments the need would be supplied.

The fact that individual protection was the most important purpose of the American Statemakers, exercised powerful influence over legislation for many years. As late as 1892 when the Supreme Court of Massachusetts was asked by the Legislature whether cities and towns might buy and sell fuel, five of the Justices said in their reply. "The object of the Constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the Commonwealth or the 'towns, parishes, precincts, and other bodies politic' to undertake what had usually been left to the private business of individuals" <sup>2</sup> The court was not unanimous on this occasion, from which it may rightly be inferred that the old idea of the nature and scope of protection was coming to be questioned. There had, indeed, risen a new conception of protection, of justice. That had been thought of concretely as a matter between man and man, where the conduct of one directly, openly, palpably endangered the other. The treatment of such conduct had been pretty well regulated by either common or statute law, and the volume of new lawmaking on that score had for a long time been comparatively small, as it has since continued. The new idea of protection, of justice, took a far wider range, entered many an untouched field, and invited bountiful harvests of fresh law, which grow larger year by year, with no sign of nearing an end.

<sup>1</sup> *Elliot's Debates*, III, 50

<sup>2</sup> *Opinion of the Justices*, 155 Mass. 598, 602

This new conception is that protection, justice, ought not to be confined to instances of conduct usually harmful only to isolated individuals, but should extend to courses of conduct dangerous to classes of individuals or to society as a whole

It is not a new conception in the sense that it is without precedent, for protective laws have been made ever since deliberative assemblies began, but it may be fairly said that not until our time did they become generic, systematic, deliberately achieving a broad purpose based on abstract principle. Also it is not always the case that the primary source of the danger is human conduct. We cannot legislate against what is called an act of God, but in many cases we provide for the human conduct that may be contributory, and our analysis will suffer no great harm if we include even those perils that are complete without human intervention. Let us attempt, then, in some degree to classify internal protective legislation that we may better appraise the wisdom of its scope and volume.

The natural enemies of all mankind furnish of course unquestionable ground for joint defense. Typical of action long familiar is the bounty on wolves. Equally sound in principle is the legislation meant to lessen the killing of sheep by dogs. Of kindred nature are the campaigns waged against pests such as the gypsy and brown-tail moths in New England, the boll-weevil in cotton States, or rabbits in Australia. Plant diseases and epidemics among animals are other kinds of calamitous visitations that surely it is proper to combat.

The diseases that attack man himself have of late years furnished a great field for lawmaking activity, for we have come to know first that the tiny organisms which at every turn threaten health and life, are enormously multiplied in number and power by conditions that men create, and secondly that these organisms can be kept under some measure of control by collective effort. To prevent the multiplication of menace is one reason for the laws about drainage, garbage, water supply, housing, and the like, and the chief reason for those about communicable disease, for which the requirement of vaccination set the example.

Such laws have been bitterly fought as an invasion of personal liberty, and frequently they have contributed to the ridicule heaped upon legislatures by the thoughtless. With mine own eyes I watched a proposal to punish spitting in public places twice laughed out of the Massachusetts House, and more the

shame to me for not trying to help the tall, gaunt Representative, himself suggesting the spectre of tuberculosis, who vainly begged our serious attention. But like most of my associates, I did not then realize that science had established the danger of the practice. The notion struck the House as an absurd assault on personal rights, and undoubtedly many a citizen added it to the reasons for scorning the Legislature, as usual jumping at the conclusion that the plea of a single member embodied the judgment of a majority. When the proposal was urged for the third time, it received serious attention, and now that it is established law, nobody would think of repeal or ridicule. Yet the impress on popular estimate of the Legislature it made on its first appearance, left indelible effect.

Like cause for misunderstanding has been given by such laws as those about the common use of towels and drinking glasses. Only slowly does knowledge of scientific discovery permeate the masses, and acceptance of new theories must expect widespread grumbling and even downright rebellion. Neglecting certain eye diseases of infants dooms many and many a human being to endure the curse of blindness, especially in the Orient, because of the superstition of ignorant mothers, who resist timely remedy; and laws on the subject even in our own comparatively enlightened land contribute to the criticism of lawmakers. Really, though, there is no more ground for such criticism here than in the instances where the relation of cause and effect is so palpable that fault-finding is almost absent, as, for example, in the case of laws about opium, cocaine, and other habit-forming drugs. Just objection is not to be made against the laws requiring examination and registration of those who follow the profession of treating disease. To protect the community against quacks has long been recognized as a legislative function. Almost in the very beginning of American lawmaking we find that at a Court of Assistants of the Colony of Massachusetts Bay, March 1, 1630-31, Nicholas Knopp was fined five pounds "for takeing upon him to cure the scurvey by a water of noe worth nor value, which he sold at a very deare rate." To be sure, we are left in doubt as to whether the Puritans objected more to the price or to the deceit, but in either case the precedent absolves us from the charge of being wholly innovators with our modern laws about drugs.

Accidents, in the broadest sense, have long been the subject

of governmental precaution. A lighthouse was one of the seven wonders of the ancient world, and every civilized country now recognizes the duty of making its shores and harbors as safe for mariners as possible, by means of lighthouses and buoys. Fires, too, have been a source of law from time immemorial. The dangers of travel gave early rise to rules of the road that were long enforced by custom, but now the automobile compels an elaborate code. Likewise the growth of steam locomotion has forced an array of provisions for the public safety, such as those about grade crossings, methods of car heating, color blindness, couplers. The use of steam for stationary engines made desirable a system of rules and inspection to lessen the chance of boiler explosions. The benefits of electrical invention brought in their train perils of fire and death that made still more law imperative. Like results follow every new application of power, whether it be a matter of elevators, or circular saws, or dynamite, or whatever the method of transforming or applying energy. Modern methods of construction, too, expose the public to dangers that seem to warrant a wide range of precaution, taking the form of building laws in great variety.

Accidents threatened by the careless or callous conduct of individuals fall into a somewhat different category and it was long held that they should for the most part be left to be dealt with by public opinion, but new and dangerous methods of transportation have in this respect made inroads on the faith of even the most strenuous objectors against the creation of what they call new crimes. The most conservative of citizens now appeal to lawmakers to protect the pedestrian against the reckless automobile driver. At first proposals to meet such new conditions are always derided as fool propositions.

Take up one of them and seriously study its origin and purpose. As good an example as another may be a bill favorably reported to the Massachusetts House of 1915 by the Committee on Roads and Bridges. It provided that any vehicle approaching a railroad or railway, should come to a full stop before crossing. Most of the committee were doubtless unfamiliar with the conditions of city life and did not realize what this would mean in the case of crossing street car tracks. Newspapers and legislators at once dubbed this "a fool proposition" and it was unceremoniously thrown out of the House. And it was "a fool proposition" if anything sharply opposed to custom is folly.

Yet the members of the committee had seen a real evil. They knew that many lives are lost each year at grade crossings. What they did not realize was that by a heartless balance of advantages society says in this as in a thousand other matters that the loss of individual human lives is outweighed by the loss of time that precaution brings to society as a whole. To compel automobiles to stop at every cross street on the main thoroughfare of a great city, unless beckoned by a traffic policeman, is not held to be "a fool proposition." There the public has weighed the evil of accident against the evil of delay, and decided to protect itself. And so it is with a great many propositions that arouse the hilarity of the unthinking. If only they would stop to realize it is all a matter of degree!

Doubtless the appeal for a safer celebration of the Fourth of July proved in its result the power of a public opinion aroused by the knowledge of the terrible total of wounds and deaths brought by the careless use of explosives, mostly to children. Yet had not the help of ordinances been contributed, would the greed of manufacturers and dealers have been controlled by complaint alone? Can we expect custom always to protect us when it is custom itself, as in the case of Fourth of July celebrations, that creates the menace? If it be urged that custom can be altered or reversed by an appeal to reason, how about one of its forms, that called fashion? Is anything more powerful, anything less open to the control of unformulated common sense, of logic unaided by penalty? Take such a matter as that of hatpins protruding beyond the brim of the hat, which for a time menaced the eyes of everybody on sidewalks or wherever women in street attire were to be met. Reports of lacerated cheeks and blinded eyes had no effect on the devotees of fashion. Legislators would not have acted had not somebody suffered the loss of sight — a dreadful affliction, all will admit. Who could blame the victim or the friends of the victim for bitter remonstrance? Yet the resulting ordinance or statute provoked ridicule. Doubtless it did cumber the statute book, and with change of fashion become obsolete. Yet for a time it served a purpose, for it set the seal of formal disapproval on an absurd and dangerous practice.

Bodily danger has not been the only effect of fashion that has aroused the ire of lawmakers. Its inconveniences have sufficed to produce statutes, as in the case of the wearing of hats by



women in places of public assembly, to the annoyance of spectators behind them. When this legislation was proposed it was ridiculed, abused, condemned, yet it has added to the pleasure of multitudes of the people. The opposition has been forgotten, but the trace of hostility to lawmaking bodies it added to a myriad other traces, has helped to swell by so much the tide of criticism.

The wastes of fashion, in all ages an economic burden of no small size, were so keenly felt in less prosperous times than ours, that they bred attempts at repression by statute. Parliament undertook to tell the people how they should measure and make and wear their clothes. With such a precedent and with the added incentive given by the pressing need of economy and thrift in a new land, surely it is not surprising that the early American colonists turned to like defense against the extravagances of vanity. In Massachusetts Bay the General Court essayed sumptuary legislation as early as September 3, 1634, by reason of "the greate, supfluious, & unnecessary expenses occasioned by reason of some newe & immodest fashions, as also the ordinary weareing of silver, golde, & silke laces, girdles, hat-bands, &c." No such apparel was thereafter to be made or bought "other than one slashe in each sleeve, and another in the backe." Also "all cuttworks, imbrodered or needle worke capps, bands, & rayles" were forbidden to be made or worn.<sup>1</sup> In Virginia it was enacted that for all public contributions every unmarried man must be assessed in church according to his own "apparel," and every married man must be assessed "according to his own and his wife's apparel."<sup>2</sup>

Doubtless there was a mixture of motives behind such legislation. It may well have been that in Massachusetts besides the economic factor there was the instinctive hostility to vanity *per se*, as inconsistent with the Puritan canons of conduct; and in Virginia some taxation expert far ahead of his times may have seen in apparel a very good measure of the capacity to make sacrifice. However, the idea of protection was foremost, just as it is to-day in the Japanese refusal to allow the women of Nippon to adopt European costumes. The motive in Japan is somewhat obscured by the fact that the men are not likewise restrained, but whether it be that only variety in feminine dress would be

<sup>1</sup> *Records of the Colony of the Mass. Bay in N E*, 1, 126

<sup>2</sup> John Fiske, *Old Virginia and her Neighbors*, 1, 234

seriously wasteful or that it is thought much more important to preserve olden habits in the case of women, we know enough of Japanese acumen to be sure that the purpose is deliberately protective

Fashion is one of the baser forms of what Professor W. G. Sumner called "Folkways," using the word for the title of a most instructive and suggestive book on habits, customs, institutions — the complex that no familiar English term describes quite so well as the Latin word *mores*. These form the basis for social grouping into community, State, or Nation. They account for patriotism, love of country. They are among the highest concerns of men. Naturally that which is out of harmony with them, that which is repellent to them, arouses hostility. Hence the prejudice and animosity against the subordinate elements of population having *mores* or folkways clashing with those of the dominant group, as in the case of Indians and negroes in the United States, of Jews everywhere, of all races under the political control of other races. This always breeds injustice and oppression, with the result that whether from motives of benevolence or from motives of prudence, the more thoughtful men charged with making laws, try by enactment to protect the weaker groups endangered, and at the same time the lawmakers who are controlled by instinct, are impelled by fear or some less pardonable motive to try to protect their own class against the menace to their folkways, perhaps to their own existence. The American colonists gave early illustration of this in their mixture of laws meant to save the Indians from oppression and themselves from destruction. In our time the most striking instance is in the case of the negro, with Federal lawmakers assuming to protect the colored man, and those of the Southern States more zealous in protecting the white man.

Without discussing the wisdom or fairness of these laws that are meant to protect either the major or the minor group, it can at any rate be observed that they respond to natural instincts so deeply seated that the statutes they produce may not be treated as among the superfluties and the trivialities.

Religious differences have been conspicuous in the clashing of group interests. The predominant sect has often tried to protect or aggrandize itself by resort to legislation, usually in the way of compelling certain observances or preventing certain practices. Stimson thinks the first sociological statute in England

was that of the year 1100 when Henry I called a convention of all the Estates of the Realm to sit in his royal palace at London and the prohibiting the priests the use of their wives and concubines was considered "The bishops and clergy granted to the King the correction of them for that offence, by which means he raised vast sums of money compounding with the priests" <sup>1</sup> A long train of questions growing out of religious belief harassed Parliament for centuries. Everybody knows that the subject was uppermost in the early lawmaking of America. The first of American legislative assemblies, that of Virginia in 1619, enacted that divine services were to be according to the ritual of the English church, and all persons were to attend worship on Sunday. The parliamentary history of the New England colonies long savored almost as much of the ecclesiastical as of the civil — a quite natural effect in communities where the town meeting was customarily the church meeting, and the town records were the church records. All this has changed. We now think it as important to protect non-conformity as our fathers thought it to secure conformity. With the purpose reversed, fortunately the number of laws thought necessary has greatly lessened, and religion in its broader aspect plays little part in legislative controversy to-day. Its complement, morality, however, is still a prolific breeder of statutes.

#### MORAL STANDARDS

The moral standards of a people, its code of ethical conduct, must be ranked high in the scale of topics appropriate to law-making — much higher than flippant critics imagine. We seldom stop to think how vital to the safety of society are even the simplest of commonplace rules that govern our daily relations. Take, for instance, truth telling. A thousand times a day we assume that we are told the truth. Life would be turned topsyturvy if we could not assume that most of the things said in the home, the shop, or the office are fairly accurate. Upon this we have built up a huge structure of practices and occupations. In great part these are protected by the force of custom, but to its help must be brought many formal declarations. One of the most ancient is the ninth Commandment — "Thou shalt not bear false witness against thy neighbor." In the shape of our

<sup>1</sup> *Popular Lawmaking*, 25, quoting Cobbett's *Parliamentary History of England*, I, 4.

laws against perjury this protects every litigant in every court of the land. Perjury, be it noted, is the crime of a man who lies when he has sworn to tell the truth. It is remarkable testimony to the power of custom that we do not think it necessary to declare falsehood when not under oath a crime, but custom falls short of being all-powerful and we could hardly get along without buttressing it by penalty for falsehood entailing measurable damages. The law of sales illustrates the need. Even more important is the great body of law relating to the performance of truth, the keeping of promises, for without the law of contracts, commerce would be chaos.

The standards of personal conduct that we usually mean by "morality" have all been set up in the first place by the people with instinctive recognition of their necessity in order to protect the common welfare or the public safety. They concern evils that do mischief not only to the persons immediately affected, but also to the community at large. The conditions of life in a new colony throw this into relief, and so it was perfectly natural and eminently proper that the founders of America should make drastic laws on the subject. We find the very first of our representative Assemblies, that at James City, Virginia, in 1619, enacting a series of measures "against Idleness, Gaming, durunkenes & excesse in apparell."

The early records of Massachusetts Bay abound in provisions with a like purpose. Of the extreme type may be cited an order of the Court of Assistants at Boston, March 22, 1630-31, that all persons whatsoever that had cards, dice, or tables in their houses, should make away with them before the next Court, under pain of punishment.<sup>1</sup> Particularly urgent seems to have been the need of restrictions on the use of intoxicating liquor, and our modern laws on the subject find plenty of precedent in those of the forefathers. Indeed the fathers went much farther than any Legislature of to-day would go, as for example when they forbade "that abominable practice of drinking healths," as "a meere uselesse ceremony" and also "an occasion of much wast of the good creatures, & of many other sinns, as drunkenness, quarelling, bloudshed, uncleannes, mispense of precious time, &c," with a penalty of twelve pence for each offence.<sup>2</sup> We smile when we read how the Assistants ordered October 3, 1632,

<sup>1</sup> *Records of the Colony of the Mass. Bay in N E.*, 1, 84

<sup>2</sup> *Ibid.*, 1, 271 (1639)

that no person in the colony should take any tobacco publicly, under pain of punishment,<sup>1</sup> but even to-day there are those who find tobacco smoke so obnoxious that they would invoke the prohibitions and penalties of law, and were they in the majority, or even in considerable number, why might not their comfort be protected? Even now that is accomplished in some measure by custom, as well as by such rules forbidding smoking in certain places.

The difficult and critical question always is whether these things should be left to the control of custom or be made the subject of written law

Nobody except the philosophical anarchist will question the wisdom of written laws against the recognized crimes, from murder and rape down. Nobody suggests written laws against such vices as gluttony or procrastination. Midway the extremes is a zone where judgments clash over such problems as those of intoxicating liquor, betting, Sunday observance, the social evil. For many centuries the position of the church was the chief factor in determining whether its canons in these matters should have the formal support of the civil authorities, and so in communities where the religious element was particularly powerful it was inevitable that laws on matters of morality should be more profuse than elsewhere. This explains the abundance of such legislation in the Puritan colonies — Plymouth, Massachusetts Bay, and Connecticut

With the wane of the church as the dominant factor in those parts of our country once completely under its sway, the religious impulse behind the laws enforcing moral standards was gradually supplanted by the economic impulse, and with the twentieth century this became the really impelling motive. That is not yet understood. Many a carper declares that we are trying to revive the old Blue Laws. As a matter of fact what he means by that name never existed except as the fiction of a libellous fault-finder. Yet admitting that the real code in colonial days was drastic and severe, we may dispute the suggestion that the moral reformers of to-day are imitating their ancestors. At any rate the motive is not the same. For proof of this take the present demand for one day of rest in seven. It is primarily an economic demand, based on protection to health, preservation of vitality, diffusion of opportunity for rest and recreation.

<sup>1</sup> *Records of the Colony of the Mass. Bay in N. E.*, I, 101.

The religious factor helps to select the Sabbath as the day of rest, as far as practicable, but even in this is not necessarily the determining factor, for it is to the public convenience that the same day in the week shall be generally taken for rest.

More striking illustration still is given by the history of the movement against intemperance. For more than two centuries public opinion, custom, habit, the *mores*, or whatever you may call the will power of the community, made no real headway in this country against the abuse of strong drink. Attempts to regulate the traffic accomplished little. After the Revolutionary War the evil stirred thoughtful men to action, their effort taking the form of appeal to the individual through temperance societies. Dr. Benjamin Rush of Philadelphia, who had been one of the signers of the Declaration of Independence, led in this work. It had a fluctuating degree of success through many years, and was thought to have reformed many inebriates, but its chief value was undoubtedly in developing a new attitude of the public mind. Gradually intemperance became unfashionable. Definite proof of the change was given about the middle of the nineteenth century by the Maine Prohibitory Law, championed by General Neal Dow. A generation or more was to pass, however, before public opinion became ripe for a general attack upon the liquor traffic. Then it began to be widely realized that intemperance was a great economic evil, wasting the vital resources of the land, impairing the efficiency of labor, handicapping industry, and creating a huge burden of taxation to care for poverty, insanity, and crime. In the end this enlisted in support of prohibition the sympathy and support of a great part of the capitalistic class, and their help brought national prohibition.

To be sure, the churches were the foci of organization, and the moral appeal played its part, but it is within bounds to say that the economic appeal turned the scale. The attempt to persuade the individual had not made this a temperate nation. Society took measures of protection, in self-defense, when it realized that the common safety demanded the form of joint action which we call law. That the particular step taken came to be unsatisfactory to the majority, has no bearing on the fact that society seeks to protect itself.

So it is in the case of other interferences with personal conduct that characterize the legislation of the times. Statutes are enacted about lotteries, gambling, pool-selling, horse racing, bucket

shops, automobile speeding, drugs, cigarettes — not so much by reason of concern over individual welfare, as for the protection of the common welfare. We are not trying to make men good by law for their sakes so much as for our sakes. The statutes at which the thoughtless scoff are in reality the proofs of an enlightened self-interest. If altruistic in some aspects, they are essentially selfish in others. They have in mind this world as well as the next. They are both ethical and practical.

Not differing in principle, but naturally thought of as on a somewhat lower plane, is another class of statutes where self-interest predominates — those meant to serve the comfort and convenience of the community. We are coming to believe that sight, smell, and hearing may justly be protected against offence. Slaughter houses and rendering plants have long been treated as nuisances, and any noxious odors or gases may be forbidden when endangering comfort. Annoying sounds are also brought within the scope of law, as in the case of steam whistles and automobile horns. More recently vision has been put in the class of things to be protected. Massachusetts has thought the matter of importance enough for recognition in her organic law, and by constitutional amendment has made possible the prevention of obnoxious bill-boards. The aesthetic factor has been one of the reasons for regulating the height of buildings.

Bodily comfort was regarded as a proper concern of law-making as long ago as the time of Henry II, Parliament directing how beds and bolsters should be stuffed. Yet in our day Western legislators have been ridiculed for legislating about the length of bed-sheets and the supply of towels in hotels.

Convenience has been the warrant for some of the oldest of rules. If they have any ethical element at all, it is subordinate, and arbitrary standards prevail, mainly that society may not be incommoded. Such is the case, for example, in the matter of the law of the road. Whether a driver shall turn to the right or the left is nowadays purely conventional. At one time safety may have been increased by a rule that tended either to lessen collisions or to keep vehicles out of the ditch, but under modern conditions such a purpose is of no consequence, and it makes no difference at all whether as in the United States we shall turn to the right, or as in England to the left, the only important thing being that there shall be a rule. Likewise all the laws about weights and measures are conventional, but nobody for that

reason doubts their desirability. No proof is advanced that the increase in the number of conventional laws enacted for the common convenience has outrun the ever-growing needs of the community

The practical value of enacted rules governing conduct warrants emphasis. It is distinctly desirable that in many social relations that have nothing to do with morality or honesty the individual shall know what he may expect and upon what he may rely. It is not necessarily that one course is better than another. The important thing is that there shall be an agreed course. Then every man can by following it proceed with confidence for he will know what to expect. He may hope that his neighbor will be deterred by the prospect of fine or imprisonment. He may count on damages if to his injury his neighbor breaks the rule. If everybody "governs himself accordingly," it will be to the comfort, happiness, and safety of all.

#### ECONOMIC MOTIVE

The economic motive is behind a great part of legislation. Indeed some thinkers have professed to find it at the root of all statutes, but that can hardly be maintained unless all protection is economic. In a sense it is, for that which guards life, health, strength, happiness, even comfort or convenience, has material advantage, but ordinary conceptions would confine the economic motive to that which directly and palpably advances material welfare. Here, too, the factor of protection, that is, of justice, may always be found. For instance, can there be any question of this in the matter of the waste of resources put by Nature at the command of mankind? Who finds folly in laws for the protection of game and fish, at any rate as far as they conserve the food supply of the people? They may be criticized if purely for the pleasure of sportsmen, but not if they help maintain the human race. Of late we have prudently applied the same principle to the conservation of forests, water powers, mineral deposits, subterranean bodies of oil; and we may yet be justified in husbanding the fertility of the soil by regulations that will surely be denounced as invasions of personal liberty and individual rights. Yet it may be set down as firmly established that no man may waste the heritage of mankind.

The economic motive first found conspicuous expression in laws relating to the ownership and transfer of property. It was



behind the rules of inheritance that go back to primeval times and were elaborately developed as long ago as the days of Roman jurisprudence. It appears in the most notable of early Norman-English enactments, such as the statutes of mortmain. It pervaded the minor lawmaking of the Parliament of olden time. Thus we find the legislators of five centuries ago prescribing the price of bread and candles, how fish should be packed, how beer was to be brewed and the barrels for it were to be made. The famous Statute of Laborers enacted in 1351, part cause of the Peasant's Revolt, fixed the price of labor, and was therein the precursor of a long line of attempts to protect the consumer by means of law. This fallacy was one of the earliest to appear in American legislation. At the very first Court of Assistants of the colony of the Massachusetts Bay held on this side of the water, at Charlestown, August 23, 1630, it was ordered that "carpenters, joyners, bricklayers, sawers, and thatchers" should not take above two shillings a day, nor should any man give more, under penalty to taker and giver.<sup>1</sup> On the 28th of September following it was ordered that laborers should not take above twelve-pence a day for their work, or six-pence with meat and drink.<sup>2</sup>

Our forefathers also imitated in the attempt to fix the prices of commodities. The Court of Assistants ordered November 8, 1633, that no person should sell to any of the inhabitants any provision, clothing, tool, or other commodities above the rate of fourpence in a shilling more than the same cost or might be bought for with ready money in England.<sup>3</sup> Likewise they brought with them the notion that special privileges in trade or industry ought to be suppressed by law. Fresh in their minds was the memory of the struggle between the people and Queen Elizabeth over monopolies when Cecil and Bacon tried in vain to save the royal prerogative, and while the builders were laying the foundations of New England every newcomer brought stories of the scandalous grants by Charles. So when the Massachusetts men framed their Body of Liberties in 1641 it was perfectly natural that they should declare as fundamental law: "No monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Countreie, and that for a short time." You have only to read the history of markets in

<sup>1</sup> *Records of the Colony of the Mass Bay in N E*, I, 74.

<sup>2</sup> *Ibid*, I, 77.

<sup>3</sup> *Ibid*, I, 111.

Boston for the first century and more of that town to know how deep-seated was the fear of forestalling and regrating and the other practices that were the prototypes of the trusts and corners of to-day

Monopolies of the soil have been feared and hated from time immemorial. The downfall of Russian autocracy, brought about in our day largely by the land hunger of the peasant masses, is but one of many instances where agrarian conflicts have changed the course of history. Englishmen have sought to face the danger with law rather than revolution. The famous statutes of mortmain under Edward I and III were meant to keep the church from getting the land into its control; already nearly one fifth of English earth was in the hands of the monasteries. From that episode down to the Irish Land Acts of our own time the land question pestered Parliament, and it is still very much alive

In America the Dutch manors long perplexed the lawmakers of New York. Land was behind the fear of corporations when they began to be formidable about a century ago. Governor Lincoln had it in mind when in 1827 he astonished the Massachusetts Legislature by vetoing an act of incorporation that had passed both Houses without a dissenting vote. Certain gentlemen of Salem had formed an association for improving the performance of church music, calling themselves the Mozart Society. What could be less dangerous? Yet because they wanted to hold real estate, Governor Lincoln balked. In five years, said he, authority had been given to corporations to possess \$30,000,000, a large part to be invested in real estate, and \$30,000,000 was one fifth of the latest valuation of all the taxable property in the Commonwealth. Such a course might end by substituting a humble and dependent tenantry in place of the high-spirited and independent yeomanry who ought to possess the real estate of Massachusetts.

The extension of the corporation idea to the fields of commerce, industry, and transportation vastly increased the occasion for economic justice. By concentrating the power of wealth, the business corporation became a menace as well as a blessing. Not only do the critics underestimate the legitimate effect of this on the volume of law, but also they fail to give it due weight as a factor in recent increase. They forget that the business corporation is a novelty. It was so new less than a century ago that

whether to permit its existence could be and was a subject of partisan controversy. George S. Boutwell in his "Reminiscences" testifies that it was such in the Massachusetts General Court in 1842 and 1843, the Whigs favoring the system and the Democrats being in opposition generally.

We still fear corporations and pass many a law to curb them. Every step in their organization is regulated, and if they meet a public need the law watches over all their acts. Their stock issues, their rates, their profits, are deemed questions of justice to the community. With blue sky laws we go even to the extent of protecting against their own credulity the men who might invest in corporations.

Those who in many another channel abuse the making of profit are met by legal obstacles as diverse as are the modern business relations. Some of these obstacles are very old, such as the laws about usury. Others are new, such as those about insurance. Some have greatly expanded in scope, such as those that by prohibiting adulteration would give the people pure food, safe milk, durable materials. Then there is the rapidly broadening field of licensing, registration, and inspection — a great mass of rules to protect society against deceit, fraud, and cupidity.

Other rules made necessary by the growing complexities of life do not necessarily imply turpitude. A new invention of far-reaching influence creates a need for defining the new rights, duties, and liabilities it involves. This has been the effect of the telegraph, the telephone, the electric motor, the automobile, the aeroplane. The laws must keep pace with all the economic changes wrought by the discoveries in the field of science.

Every invention tends to increase the sub-division of labor. This means new frictions between conflicting activities. Every new occupation brings new opportunities to infringe on the rights of others. The more numerous the specialties, the more occasion to demark by rules and regulations.

Economic, too, is the greater part of the foundation for the protection of wage-earners that bids fair to be the conspicuous characteristic of the twentieth century. Its beginnings, in 1802, followed closely on the growth of the factory system out of the inventions of Watt and Arkwright, Hargreaves and Crompton. For many years labor laws both in England and this country were chiefly factory laws, but of late their scope has been greatly

widened and now the State appears to have accepted as one of its functions the guardianship of the life of the toiler in almost every phase — not only as to wages, hours of labor, and working conditions, but also as to protection against accidents and as to compensation if they are suffered, insurance in case of sickness, unemployment, and old age, as well as death, housing, sanitation, nutrition, instruction, with a share in management and profits the next step.

It is felt that the common welfare demands the conduct of industry under the most efficient conditions. The maximum of product cannot be secured from toilers working so many hours in the day that fatigue impairs the immediate results and eventually destroys vigor and vitality. Wages that do not permit the maintenance of a reasonable standard of living, will result in an aggregate of output below that which a fair payment would bring. Occupational diseases and the use of noxious materials cut short the lives of trained workmen and thereby mean the loss of just so much human machinery. Likewise wasteful is permission to abstain from providing accident-preventing appliances. Particularly inimical to the common welfare is the employment of women and children for excessive hours, and of women during periods of pregnancy or too soon after childbirth. Destructive also are the conditions in sweat shops.

Mixed with economic motives, which are distinctly selfish, are humanitarian motives, distinctly altruistic. There are those who maintain that the lessening of cruelty is the only change in human nature in all the centuries covered by our knowledge of the lives of men. This change is strikingly shown in the present-day attitude toward dumb animals, for now in the more civilized countries the needless infliction of pain upon beasts of any kind is commonly looked upon with abhorrence. Man's inhumanity to man, however, still makes countless thousands mourn, and but slowly do we admit that justice, protection, includes among its obligations kindness, sympathy, pity. Their place is on the equity side. To explain the meaning of this, take the workmen's compensation laws. Their effect is two-fold. First, they have an economic advantage in that by shifting the cost of industrial accidents to the consumer, they lessen the drain on the savings of the toiler, reduce the wasteful outlays of charity, public or private, and improve the morale of labor. These are shadowy gains compared with the second effect, that of lessening individ-

ual hardship Herein society tries to help its victims. Or again take the laws about insanity. Here also is a selfish motive, that of the gain from curing mental disease when possible, but the altruistic motive of compassion is the more important.

In this field there has been distinct change of public attitude within the last half century. When T. D Woolsey wrote his book on "Political Science," he doubtless gave the prevailing view in saying (I, 214) the feeling was not that the poor person, or orphan, or widow, had any right to help in the jural sense, and that the poor man or orphan could not create any obligations by his wants. Now the belief spreads that society is in some measure to blame for poverty, that the wants of the afflicted are in some measure due to the social system itself, and that it is a proper function of the State to correct economic inequalities and maladjustments. Whether this belief is or is not well-founded, it accounts for various novelties in lawmaking and it grows. Already the feeling that society is responsible for its by-products shows itself in the new attitude toward the relations between capital and labor. For example, no longer is it contended that employer and employee contract on equal terms. Laws are changing so that trade unions and shop organizations may function. If the loud demand for a better distribution of wealth proves to be more than a symptom of hard times, quieting down with a return to normal prosperity, it may breed still more laws regulating the economic relations of men under a capitalistic régime.

## CHAPTER XXIII

### VOLUME AS RESULT AND EFFECT

THE result of all these influences set at work by the vastly increased complexity of the social relations has been corresponding demand for laws. In considering their volume, first see what has taken place. In 1880 there were 648 bills introduced into the General Court of Massachusetts, in 1890, 879; in 1900, 1734, in 1910, 2240, in 1920, 2442. In forty years the work to be done increased between three and four times. In the regular Illinois session of 1931 the bills introduced totalled 2031. Taking at random the figures for one of the smaller States, Nebraska, with a population about one third that of Massachusetts, and a biennial session virtually restricted to sixty days by the per diem limitation, we find that in 1913 bills to the number of 1536 were introduced.

The stunt for that year was very close to the average task of an American Legislature. According to the computation of the Legislative Reference Bureau of the New York State Library, as reprinted in "Equity" for January, 1919, there were introduced in 157 regular sessions of State Legislatures in the six years from 1911 to 1916 inclusive, 213,482 bills, an average of 1360 to a session. Of the Legislatures sitting biennially, North Carolina led with 4173, 4308, and 4108 in its three sessions. New York, where sessions are annual, had 4081 in 1913.

Who would blame a machine, an automobile, a bridge, because it broke down when overloaded? Why not be equally reasonable in judging the apparatus of government?

The astonishing growth of the work of Congress is shown by the record of bills introduced in the House alone in the sixty years after the period of the Civil War. In the 38th Congress (1863-65) they numbered 813, in the 48th (1883-85), 8290, in the 58th (1903-05), 19,209, in the 68th (1923-25), 12,474. The figures are not to be taken wholly at their face value. When years brought infirmities to the surviving veterans of the Civil War, in great numbers they sought help in the shape of special pension bills. These were the chief factor in swelling the total

to the maximum reached in the 61st session, 33,105. There had been 7061 private pension bills in the session before. Then the need began to be met by general pension legislation, which with statutes putting outside the pale certain classes of hoary claims, caused a sharp drop in the number of bills. The total still included, however, a large number of private pension bills separately introduced and then consolidated. In the 66th Congress the seventeen omnibus pension bills reported to the House contained 3596 private bills that became law.

In the three Houses from 1925 to 1931 the introduction of bills ran remarkably even — 17,415, 17,334, 17,373. Then there was a drop to 14,799, with a greater in the 73rd Congress (1933–34) to 9968. For a full measure of the work in the House there must be added well up toward a thousand resolutions of one class or another. On top of this comes the record in the Senate, with 1955 bills introduced in the 73rd Congress. Not a few of these were duplicates of proposals presented to the House, but enough were novel to make the grand total of the number of measures of all sorts brought into that Congress between twelve and thirteen thousand.

How to account for the recent drop is beyond me. It might have been thought that discontent bred by hard times would have produced the same result that has been noticeable in periods of excessive political agitation, for instance, such a period as that in Massachusetts when the Whig party was breaking up and a group of young enthusiasts were seizing power. As one result the record of the General Court was broken in 1853 by the putting of more than 1500 measures into the Orders of the Day. The same sort of thing accompanied the Progressive movement that came so near sweeping the country sixty years later. In Massachusetts it led to an increase in the number of bills introduced from 2155 in 1909 to 3459 in 1914. Then the wave of political excitement slowly receded and in 1916 the number of introductions had fallen to 2824. Also after the disturbed period of the World War there was recession, with a drop from 2442 bills introduced in 1920 to 1909 in 1930, the figure rising in 1934 to 2027.

Are these fluctuations or is the rapid growth of business as a whole to be laid at the door of the legislators themselves, with such element of blame as may be implied? Dispassionate study of the situation by anybody in position to know the facts can

permit but one answer. Although in some small degree legislators may themselves be responsible, by far the larger part of the responsibility goes beyond them, to the public at large. Lawmakers rarely create, they respond. This is not the common opinion. It is widely supposed that practically all bills are introduced by legislators of their own initiative, generally from motives that are not lofty, if indeed they are not discreditable.

Two illustrations of the type of criticism that has fostered this belief may suffice as an example of it all. First I select the scathing words of a man who had been Governor of New York, David B. Hill. Said he. "Legislators have acquired the pernicious habit of excessive activity, devising and enacting measures simply to occupy the time during which they are expected to be at their respective State capitols — resulting in an enormous number of measures of no substantial benefit to the community, many of them petty and ridiculous in their purposes, and dangerous in their invasion of the liberties of the people, or special, local, and private in their nature, with few general laws of practical utility and widespread importance."<sup>1</sup> Next a more recent denunciation, that by Walker D. Hines: "When a man becomes a legislator he naturally wishes to make a showing. The only practicable way in which he can make a showing is by doing the only thing which his department has the power to do — that is, to make laws. Hence we see the average legislator bent on getting a law through, not because the law is necessary, not because it will be workable, but because it will be another law and one of which he can claim to be the author"<sup>2</sup>

The trouble with this sort of thing is simply that in any broad and general sense it is not true. There are sporadic instances of the introduction of a great number of bills for the purpose of self-advertising and of catering for popularity. At the other extreme are many, many legislators who never introduce a bill unless upon the urging and insistence of constituents. Between the extremes are those lawmakers animated by a legitimate and honorable wish to be of service to their fellow-men, anxious to right wrongs, hoping to ameliorate the condition of mankind, eager to share in translating into action what they conceive to be the desires of those whom they represent. To impugn the motives of these men by sweepingly ascribing all their actions to

<sup>1</sup> "We Are Too Much Governed," *No Am Review*, March, 1900

<sup>2</sup> "Our Irresponsible State Governments," *Atlantic Monthly*, May, 1915.



self-interest and the pettiest form of ambition, suggests that the fault-finders may be quite ready to see in others the motives with which they are most familiar in their own conduct.

The great bulk of the work of every lawmaking body is brought to it by the people, for though the legislators themselves may often take the credit of authorship, the instigation comes very largely from the outside. Here again there is no tenable ground for blame. Apart from a comparatively few projects for change advanced by demagogues or agitators or men with minds of doubtful balance, the proposals that the people present are seldom wholly unreasonable on the face. They are for the most part both sincere and serious. It is absurd to suppose that only passing whim and idle fancy are behind them. Observe the petitioners before the committees of any Legislature and you must admit that they are generally honest, thoughtful men with what they believe a real grievance, or else honorably anxious to make the conditions of life easier, better, more just. Can it be imagined that nothing more than passing impulse or petty purpose leads large numbers of citizens to go to all the trouble and expense connected with getting legislation? Visits to a capitol always mean the sacrifice of time. Will men of affairs lightly make that sacrifice? Often such visits mean no inconsiderable outlay for fares and hotel bills. Do sober men throw away their money? Every cent received by lobbyist or legislative counsel, every pamphlet, every letter attests a serious motive and grave concern on the part of somebody. The burden is rarely invited. Men usually accept it because impelled or compelled by circumstances, by causes outside themselves, often beyond their control.

#### CONGESTION

The inevitable effect of the volume of bills is congestion. This means that it is out of the question to give to each of them serious consideration. With the average Legislature asked to consider 1360 propositions in the average session, a little figuring will show the situation. Suppose the Legislature sits on 80 days. Then if it gave equal time to each bill, it would dispose of seventeen a day, and if it worked for five hours and forty minutes, each would get twenty minutes. As a matter of fact there are some Legislatures that could not give more than ten minutes to each request, if all the bills reached the calendar.

Two avenues of escape from this condition have been used — one in the direction of turning the work over to committees, the other in the direction of leaving most of it undone. The committees of a few Legislatures are still expected to report on everything, with a chance to debate every report in the House. Most of the States have abandoned the attempt as hopeless. Even the committee system is taxed beyond its capacity. Lieutenant Governor Wallace told the Governors' Conference of 1913 that he had known a man to come six hundred miles to present to a committee of the California Legislature a thought that was in his mind, which was important, as he believed, and five minutes were given to him, sometime after midnight. "Why? They hadn't time to give him longer. They were not to blame; they had so much to do."<sup>1</sup> Judge Lowell, after describing the postponements of the Torrens Act in the Massachusetts General Court, concluded. "Thus an important measure was refused serious consideration, not because the House was hostile, not because its members were venal partisans, but because, under our system, there can be found no Representative with leisure for serious study."<sup>2</sup> Here was no trifling local bill of petty consequence, but an important reform greatly needed, delayed for session after session through the inability to find time for its proper treatment. A myriad of like instances could be gathered. Every legislator in the land can testify as to the seriousness of the situation.

The evil is not alone that pressing problems are long delayed in the solving. That probably does less real harm than comes from poor work on the bills happening to be passed. The world would get along after a fashion if there were no new laws. The sufferings would be negative, and that is not the worse variety. It is the positive suffering brought by bad laws that is the more painful. Bad laws are liable to carry in their train calamity for individuals, ruin for nations. Even the best laws almost inevitably work harm to somebody. Every law disturbs status, benefits some at the cost of others, justly enough if the law be good, but nevertheless with loss for somebody. Recall the inkeepers, stage coach drivers, teamsters who were ruined by the laws making railroads possible.

If it is of utmost importance that bad laws shall not be passed,

<sup>1</sup> *Proceedings*, 283

<sup>2</sup> "Legislative Shortcomings," *Atlantic Monthly*, March, 1897.

it is of almost as great importance that good laws shall be as good as possible.

Reflect on the difficulty of the lawmaker's task before meting out to him too savage condemnation. By yourself take at random a single statute and see how much study you would have to give it before you approved not only its main proposition but also every minute detail, every phrase, every word, yes, every punctuation mark. Then imagine yourself confronted with 1360 such propositions and perhaps only sixty days at your command. The chances are in that time you could not understandingly even read all the bills introduced at one session of a Legislature in one of the larger States. Do you think, then, that you could master them all? Do you think you could find the existing law in each case, know how the change proposed would modify it, see clearly how far the effect would reach, measure the evil to be cured, and decide whether the change would be wise? Try it.

Remember that as the work has grown, the number of working days set by custom or Constitution has generally been held fast, in some cases has been actually lessened, in no case has been lengthened in proportion to the growth of business. Massachusetts, with annual sessions and no limits, has probably gone farther than any other State in trying to adjust the time to the work. In the period just before the Civil War its General Court usually sat between four and five months, now the sessions range from five to seven months. Yet the usual amount of work to be handled has increased five or six-fold.

In view of all this, surely there can be no surprise at such a declaration as that of the Nebraska Legislature of 1913 in a resolution (House Journal, 1348) that "in Nebraska as in many other States the number of bills introduced is beyond the capacity of the Legislature." Surely the blame for what follows may not be justly attached to the Legislatures collectively or to their members individually.

The situation is worse in Congress, partly because of the greatly larger volume of bills, partly because of the imperative need that a very few of them shall get the bulk of the available time. Speaker Cannon testified "The real trouble in Congress is the great volume of business laid before it at every session, much of it clearly out of place there."<sup>1</sup> A critic ordinarily far less charitable, H. J. Ford, in this instance speaks for the defense.

<sup>1</sup> "The Power of the Speaker," *Century Magazine*, June, 1909.

"Congress," he says, "does the best it can do in the circumstances, for it is really the most diligent legislative body in the world, but the harder it works the more it flounders in the mass of legislation thrust upon it." The result is that it is no longer a deliberative body, but a ratifying body, turning into law by superficial and hasty approval that small part of the work of its committees which chances to survive the fierce struggle for opportunity to be heard.

Congress has less excuse than the State Legislatures, for there is less reason why it should endure the deluge of trivialities. A Legislature comes close home to the daily lives of the people, and must concern itself with a multitude of their troubles. In the great forum of a great nation none but great problems should be considered. Detail should be admitted only as it is incidental to those problems, and then as little of it as possible. The remedy? It is so simple, so natural, that it must be adopted sooner or later as the nation's business grows. Administrative detail must be turned over to administrative agencies.

A start toward this can be made by a single requirement, simple and reasonable. Mr. Cannon said what every Congressman will verify: "The members feel compelled to introduce every bill offered by their constituents, and these burden the committees and fill the calendars to the embarrassment of the really important legislation." Why not require that every bill the subject matter of which relates to the work of any Department or Bureau, shall first be automatically referred thereto for examination and report, and that on its return if the recommendation is adverse it shall run the gauntlet of a Committee on New Business, with obstacles put in the way of its reaching a standing committee? These obstacles should not be insurmountable, but if reasonable they would vastly reduce the quantity of measures brought to the point of Congressional consideration.

Still more of trivial effort and waste of time would be saved if in the case of certain classes of requests thus submitted to Departments or Bureaus, their heads should be empowered to issue administrative rules and regulations having the force of law unless negatived by Congress within a specified time. For instance, there is no valid reason why bills about bridges over navigable waters should encumber the calendars of House and Senate. If the judgment of the army engineers cannot be trusted in such

matters, to whom can we turn? Or take the case of the transfer of public lands, such as may have been used for a military reservation and are no longer needed. Again, Congress is stupid in persisting to act as the Board of Aldermen for the District of Columbia. It should permit the District Commissioners to frame all necessary ordinances and make all appropriations, subject to a negative by Congress. Other relief can be had by resort to remedies not novel, remedies tested by experience and in no way out of harmony with our political habits and institutions. For instance, if the nation would follow the example of various States and permit itself to be sued in tort as well as contract, many claims would be kept away from the doors of Congress and at the same time vastly more of justice would be done to claimants. Whether equitable jurisdiction now exercised by Congress could be safely transferred to other tribunals, is a more difficult problem, but even this would not be wholly without precedent, for in the matter of criminals the tendency in the States is to entrust public mercy to pardon boards.

Curiously enough while we complain because our systems permit the channels of legislation to be choked, Englishmen find in those systems a reason why we are, in their opinion, not so badly off as they are. Dicey says: "The constitutionalism of the United States, no less than of France, has told against the promotion of that constant legislative activity which is a characteristic feature of modern English life."<sup>1</sup> This view, whether right or wrong, may at any rate serve to show that the evils are not peculiar to America. For a long time thoughtful Englishmen have been complaining. Alexander Mundell, writing of Parliament in 1834, said: "There seems to be a rage for legislation, which appears to be ungovernable and requires to be put under control."<sup>2</sup> A generation later Walter Bagehot, authoritatively discussing "The English Constitution," declared: "The greatest defect of the House of Commons is that it has no leisure. The life of the House is the worst of all lives — a life of distracting routine. It has an amount of business brought before it such as no similar assembly ever has had."<sup>3</sup>

Since then the situation has been steadily growing worse. Gladstone declared: "The Parliament is over-weighted; the

<sup>1</sup> A. V. Dicey, *Law and Opinion in England*, 9.

<sup>2</sup> *The Philosophy of Legislation*, 237.

<sup>3</sup> Walter Bagehot, *The English Constitution*, 173.

Parliament is almost overwhelmed " In 1894 Sir Albert Rollitt averred that "business in the House of Commons had become more and more congested " More recently this has been emphasized again and again by Sir C P Ilbert, who as Clerk of the House was surely in a position to know the facts and understand them. In his work on "Legislative Methods" he said (212, 213): "The net result of the legislative activity which has characterized, though with different degrees of intensity, the period since 1832, has been the building up piecemeal of an administrative machine of great complexity, which stands in as constant need of repair, renewal, reconstruction, and adaptation to new requirements as the plant of a modern factory The legislation required for this purpose is enough, and more than enough, to absorb the legislative time of the whole House of Commons, and the problem of finding the requisite time for this class of legislation increases in difficulty every year, and taxes to the utmost, if it does not baffle, the ingenuity of those who are responsible for the arrangement of Parliamentary business " He stated the case in his preface to Redlich's Procedure of the House of Commons "The main problems of parliamentary procedure under existing conditions are two On the one hand, how to find time within limited Parliamentary hours for disposing of the growing mass of business which devolves on the Government, and on the other hand, how to reconcile the legitimate demands of the Government with the legitimate rights of the minority, the despatch of business with the duties of Parliament as a grand inquest of the nation at which all public questions of real importance find opportunity for adequate discussion " This he repeated in almost identical words in his little book on Parliament.

Another judicious observer describes the actual result "The House of Commons is buried under the multiplicity of its nominal duties, the variety of its functions, the mountainous mass of its interests. The result of trying to cope with these colossal tasks is that the business of the House is in arrear, as a matter of course, after the first few weeks of the session, and members, with reluctance, or relief, surrender the whole conduct of transactions into the hands of the Ministers, who alone, with the assistance of the officials of the House and the chiefs of the permanent Civil Service, know what is being done, and can keep their heads in the whirlpool " <sup>1</sup>

<sup>1</sup> Sidney Low, *The Governance of England*, 87

The effect on the character of legislation was noticeable as long ago as 1861 when John Stuart Mill pointed out in his book on "Representative Government" (ch v) that the utter unfitness of England's legislative machinery for its purpose was making itself practically felt every year more and more "The mere time necessarily occupied in getting through bills renders Parliament more and more incapable of passing any, except on narrow and detached points. If a bill is prepared which even attempts to deal with the whole of any subject (and it is impossible to legislate properly on any part without having the whole present to the mind), it hangs over from session to session through sheer impossibility of finding time to dispose of it "

The situation had become much worse when the Select Committee on House of Commons Procedure sat in 1914. In speaking to that committee about the results of what he called "a general incompetence of the legislative machine," Lord Robert Cecil averred that the measures actually strangled are the useful, non-contentious proposals, departmental bills and the like, which are really needed, and would, by the admission of all, be beneficial. "It is these that are too often crowded out, not because anyone objects to their provisions, but because the necessities of party warfare, and, I ought to add, the idiosyncracies of individual members, have produced their destruction."

A writer in the "Round Table" for September, 1918, addressing himself to this point, declared the time of Parliament to be so precious that Ministers will not look at a measure likely to provoke the opposition of a vested interest unless there is a wave of sentiment behind it. But measures most vital to the public interest, the reform of local taxation, of the poor law, or of land-title, do not from their nature evoke storms of enthusiasm. Potential majorities in favor of passing such measures may exist, and yet in the present congestion of business their passage may be blocked by a vested interest or a reactionary clique. Ministers simply dare not risk the loss of parliamentary time involved. They dare not expend in debate the time without which public opinion cannot be brought to realize the vital necessity of such reforms. Furthermore the writer declares that the discredit into which Parliament has fallen is due not to any decline in the several capacity of its members but to the inevitable decline in their joint capacity to deal with the needs of a growing community. These needs must increase. Their time, so long as they re-

main in one body, does not increase. It is restricted by immutable limits which have been reached long ago.

Before the Great War it was usual for Parliament to work on about 140 days in the year. Financial, political, and procedural matters took up about half the time, and on the average fourteen days were spent on the bills of private members, leaving less than sixty days in a session available for Government legislation. In the decade from 1900 to 1909 there were 388 Government bills passed, of which sixty were finance measures. Of the others the ten ranked as of principal importance took 207 days, and the 318 remaining bills were passed in 276 days. To an American legislator this might not seem hasty work, accustomed as we are to a great deal of chaff with the wheat, that is to say, much petty legislation, but in view of the serious nature of most of the bills enacted by Parliament, it is not surprising that Englishmen view the situation with alarm.

To us the extent to which the recommendations of President or Governor are ignored, gives no great anxiety, but an Englishman views otherwise the failure of the Ministry to accomplish its work. The mention of a bill in the Speech from the Throne is taken as strong *prima facie* evidence that the responsible Executive in office considers it necessary to the public welfare. Yet of the 115 measures mentioned in the Speech in the course of the decade from 1900 to 1909, not more than half were passed in the same session, and more than a quarter were never introduced at all. With the situation everywhere the same, who can doubt that the fault is not with men but with methods?

The ratio between the number of bills introduced in any legislative body and of the laws enacted gives in itself no occasion for praise or blame. So many factors enter that sound inference is impossible, but the figures show at any rate that the Legislatures do winnow. The 24,348 bills introduced in Massachusetts in the decade 1905-14 resulted in the enactment of 7988 acts and resolves — almost exactly one third. In New York the ratio is about the same, and probably is not far from that in most of the States. In Congress with 76,889 bills introduced in the Houses of the five terms from 1925 to 1934, there were passed 4018 public bills and 1394 private bills — a total of 6488 — on the face of it between eight and nine per cent of the bills introduced, a percentage, however, that does not take into account the number of pension bills consolidated into omnibus bills.



It must not be concluded from these figures that Congress is more discriminating or conservative than the Legislatures. The amount of work left undone is a factor not to be overlooked. The House of the 73rd Congress adjourned in 1934 with 713 bills pending out of 1928 that had been reported by committees. The Senate committees made 1458 reports and the Senate passed 846 bills and joint resolutions. Conclusion is complicated by the laying aside of bills reported by committees, with substitution of bills from the other branch. Also vetoes must be taken into account, and the few bills that after passage by one branch are rejected by the other. It is probably fair to say that Congress adjourned leaving undone a quarter of its work as measured by numbers, though of course not in importance, for virtually all the big bills were enacted. However, any measure that has run the gauntlet of a committee ought to have at least the chance of a vote on the floor. The only excuse is that Congress like most of the Legislatures has far more work than can be handled under present methods of procedure. The failure to do it is not the least of the causes why our legislative bodies are for the most part in disrepute.

From the beginning up to and including the 73rd Congress (1933-34) there had been enacted 56,428 bills and resolutions. The library of Congress Index to Federal and State Legislation for the biennium 1931-32 shows 21,999 acts and resolutions requiring a volume of 1095 pages merely to describe. Such figures distress many a writer of editorials and essays. They result in such scare-heads as "Perfect Law-Abiding American Citizen Must Observe 2,000,000 Statutes"<sup>1</sup>. Let the man who worries over such a fate, dissect and take heart. First he will find that a very large number of these were private laws, their ends accomplished long ago, or laws appropriating money, 'all of it now spent, save for the authorizations of the last year or two. Many of the public laws are dead but unburied. Ninety-five per cent or so were State enactments, and as no man has a legal residence in more than one State at the same time, only about one in twenty will touch him unless he chances to be traveling or to have property in another State than his own. Of 495 acts and resolves that in 1930 passed the General Court of Massachusetts, 205 related to matters of local government — cities, towns, counties, and particular districts — reducing by perhaps a third

<sup>1</sup> *New York Herald Tribune*, September 12, 1926

more the likelihood of personal contact. Taking out also the measures classified as administrative and private, there remained 116 that could be viewed as applying to the public at large, and most of these no citizen would ever know anything about or be called upon to obey.<sup>1</sup>

Some laws correct typographical or other minor errors. Others validate acts of officials. Others repeal. Others amend administrative statutes in matters of mechanical detail. Richard J. Lyons, Illinois legislator, thought that of the 492 bills that became law in the 1931 regular session, only forty-three were really new laws.<sup>2</sup> It has been estimated that each Congress enacts only about twenty really new laws in each of its two-year terms.

Comparisons between the volume of American lawmaking and that of other lands are made next to worthless in and of themselves by the fact that we put into the form of statutes a vast amount of rules that elsewhere are dealt with by what may be described as either executive regulations or administrative ordinances. Whether we are actually more prolific in point of genuine law, is uncertain. The fact is that all over the world the same phenomenon appears. An index of the legislation of the British Dominions from 1897 to 1907, giving the briefest of headings, filled four great volumes. Our American achievement of more than ten thousand statutes a year is probably but a tithe of the world's total. To this must be added the enormous mass of judge-made law, for the courts are just as busy as the Legislatures.

#### OBJECTIONS TO CHANGE

It was a custom of the Locrians that he who proposed a new law, should stand with a halter round his neck, to be instantly tightened if the public assembly, on hearing his reasons, did not then and there adopt his proposition.

Thus the Locrians found a way to check a propensity obnoxious to all mankind in the remote past, and to the greater part of mankind to-day — the propensity to change the laws. As Proudhon puts it, the mass is by nature unfruitful, passive, and refractory to innovation. Maine tells us that the enthusiasm for change is known to but a small part of mankind, and to that

<sup>1</sup> *Harvard Law Review*, April, 1930

<sup>2</sup> *State Government*, January, 1932

part has been known but for a short period during a history of incalculable length <sup>1</sup>

The birth of democracies and republics did not at once alter the situation. There was very little of really new law made either in Athens or in Rome. From Saint Paul we have gained the impression that the people of Athens were always wanting some new thing, but if that extended to laws, it was against the counsel of their wisest. Solon was of the belief that only those laws which had been sanctioned and established by long usage, and under which the citizens had been born and educated, were likely to be religiously observed. From this conviction he derived the principle that it was better to retain old laws, even though in some respects objectionable, than to be always eager to change them for new ones, though possibly superior. Aristotle in "The Politics" held to the same belief, declaring the habit of lightly changing the laws to be an evil. When the advantage is small, some errors both of law-givers and rulers would better be left, the citizen will not gain so much by the change as he will lose by the habit of disobedience.

In spite of these precepts of the sage, venturesome men have not failed to grasp the chance for innovation presented by the forms of popular government. When our Nation was in the shaping, already there had been enough of this to lead James Madison to declare, in Number 10 of "The Federalist". "The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal disease under which popular governments have everywhere perished, as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations." And he further testified: "Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable."

From the language it might be inferred that he had in mind changes in leadership rather than in laws, and perhaps what we commonly think of as politics was uppermost in his thought, but we now know that at least one of the complaints he had received, from the type of man he described, was aimed directly at the changes in laws, for Thomas Jefferson had written to him, December 20, 1787. "The instability of our laws is really an im-

<sup>1</sup> *Popular Government*, 135

mense evil I think it would be well to provide in our Constitutions that there shall always be a twelvemonth between the engrossing a bill and passing it, that it should then be offered to its passage without changing a word, and that if circumstances should be thought to require speedier passage, it should take two thirds of both Houses, instead of a bare majority." <sup>1</sup>

De Tocqueville quoted this nearly half a century later when he found no one in the United States denying the instability of the laws or contending it was not a great evil. He declared America to be that country in all the world where the laws lasted the shortest time. His explanation was that while the mutability of the laws is an evil inherent in democratic government, because it is natural to democracies to raise men to power in very rapid succession, the evil is more or less sensible in proportion to the authority and the means of action which the Legislature possesses, and that as in America the authority exercised by the legislative bodies was supreme and nothing prevented them from accomplishing their wishes with celerity and with irresistible power, the circumstances that contribute most powerfully to democratic instability, were here in full operation.

It cannot be gainsaid that at any rate some parts of the country furnished ample warrant for such strictures. For example, Governor Thomas Ford tells us that after the organization of the State government of Illinois until the revision of the code of statute law in 1827, all the standard laws were regularly changed every two years, to suit the taste and whim of each new Legislature. "For a long time the rage for amending and altering was so great, that it was said to be a good thing that the Holy Scriptures did not have to come before the Legislature, for that body would be certain to alter and amend them, so that no one could tell what was or was not the word of God, any more than could be told what was or was not the law of the State. A session of the Legislature was like a great fire in the boundless prairies of the State, it consumed everything. And again, it was like the genial breath of spring, making all things new" <sup>2</sup>

Even in so old and conservative a Commonwealth as that of Massachusetts, men thought they had ground for bitter complaint. Said Samuel French of Berkley in the Convention of 1853: "When I came here, I was in great hopes that we should amend our Constitution in such a manner as to elect our gov-

<sup>1</sup> Jefferson's *Works*, II, 333

<sup>2</sup> *History of Illinois*, 31, 32

error triennially, and that the Legislature would be elected in the same manner I thought that by doing that, we should give the ink on the paper where our laws are written, sufficient time to dry, so that the judges and lawyers could understand them; for as it is now, a lawyer would have to spend his whole time, and could not have much respite, if he undertakes to keep the run of our legislation, and all the changes that are made in the law." <sup>1</sup>

In the records of that Convention I find a typical arraignment of the evil, admirably disclosing the viewpoint of the most numerous and severe critics of the legislative product — the lawyers. It was Judge Charles Allen, an eminent jurist, who said: "The evil is to be found in the amount not only of unnecessary business which is transacted, but in the transaction of much that is absolutely pernicious. We talk of standing laws to regulate the conduct of men in Massachusetts. We have no standing laws. It is a misnomer. Call them rules and regulations for the conduct of the people of the Commonwealth for the year 1853, and you will give the laws of the Commonwealth of Massachusetts a proper name. Who believes that the people of Massachusetts require a new code of laws to be enacted every successive year by every successive Legislature? Sir, laws to be of value should be known, otherwise they are a snare, and to be known, they must be abiding and permanent in their character. And this perpetual change ought to destroy — or will destroy, if it ought not — all respect for the legislation of Massachusetts and its laws. They are not comprehended by the lawyers, by the courts, nor by the people. . . There has not, I apprehend, been a single Legislature for the last eight or ten years, that has not made some change in the laws relating to a most important subject, which comes right home to every man's business, and upon which every man ought to have some knowledge — I mean that of insolvency. A change is made this year upon the suggestion of somebody, who, perhaps, has a case in court, and some provision of the existing law pinches him a little. A change is therefore made in all kindness to accommodate that man, and to remedy that particular evil. The next year it is found that the law was better as it was before, and another change is made, and the old law restored."

Observe Judge Allen's interesting theory of the part the courts

<sup>1</sup> *Debates*, 1, 786

should play in the making of laws "It is much with a new law as it is with a new piece of machinery," he said, "there is a great deal of friction about it which, until it has been removed by use, renders the motion uncertain and imperfect. There is an uncertainty about our language, as I think many gentlemen in this body must know by sad experience, and until the laws have received the interpretation of the courts, which they are sure to do in the course of time, then, and not till then, may they be said to be a rule of action. But a fresh Legislature comes, and, with ruthless hand, uproots the whole work of past legislation, changes the whole course of justice, and renders that uncertain which, by the decisions of the courts, and by the general practice and understanding of the people of the community, had become fixed and settled."<sup>1</sup>

Of course it was lawyer's law of which the Judge was thinking, the law that concerns private rights rather than public duties. It was even then the minor part of the yearly statutes, but it loomed largest in the judicial mind, and it is to-day the chief source of the abuse heaped upon legislators by lawyers. With their faces ever turned toward the past, with their livelihood built on precedent, some of them deny almost the possibility of novelty. Judge Alton B. Parker said to the American Bar Association in 1906 "Every man who has had occasion to study the question, even in its narrower bearings, has been forced to conclude that but a small percentage of proposed new enactments involves a new principle or even a new policy. It rarely happens that an offence is committed for which no proper punishment has been provided, and it is a long time since any real question has arisen between men to demand legal settlement impossible under existing law."

Do not imagine, however, that such views are confined to the legal profession. E. L. Godkin had said much the same thing a few years before Judge Parker spoke. "An examination of any statute-book," Godkin declared, "discloses the fact that necessary legislation is a rare thing, that the communities in our day seldom need a new law." With his customary dogmatism he went on to aver such an examination would further disclose the fact that most laws are passed without due consideration, and before the need of them has been made known either by popular agitation or by the demands of the experts. "It would not be an

<sup>1</sup> *Debates*, I, 959

exaggeration to say that nine tenths of our modern State legislation will do no good, and that at least one tenth of it will do positive harm."<sup>1</sup>

Here you have in sharp outline the attitude of those men who think the world can never be much better and that most change must be for the worse. They revere the past and dread the future. In this they are but true to the inherited tendency that has been the lot of mankind, for paradoxical though it may seem, all human progress has been made against human protest. Even when the fact of progress is admitted, it is not admitted to be progress. As Maine puts it, nothing is more distasteful to men, either as individuals or masses, than the admission of their moral progress as a substantive reality. This unwillingness shows itself, as regards individuals, in the exaggerated respect which is ordinarily paid to the doubtful virtue of consistency. The movement of the collective opinion of a whole society is too palpable to be ignored, and is generally too visibly for the better to be decried, but there is the greatest disinclination to accept it as a primary phenomenon, and it is commonly explained as the recovery of a lost perfection—the gradual return to a state from which the race had lapsed.<sup>2</sup>

Maine points out that ancient literature gives few or no hints of a belief that the progress of society is necessarily from worse to better.<sup>3</sup> He says the tendency to look not to the past but to the future for types of perfection was brought into the world by Christianity. If Maine is right this may in part explain why those men to whom the Christian religion most appeals are apt to be foremost in civic movements looking to reform of every kind. It also may in part explain why it is that whatever the difficulty in reconciling Religion and Science in other relations, they clearly harmonize in the field of lawmaking. Religion approves every change that will elevate moral standards or otherwise ameliorate the condition of humanity. That aspect of Science which we know as Evolution not only approves constant change, but demands it. The men of science tell us that change is life, stagnation is death. Bergson argues to the effect that everything which lives, changes. F. H. Giddings shows that although Spencer had earnestly protested in all his political writings against the over-activity of parliaments, yet as a psycholo-

<sup>1</sup> *The Decline of Legislatures*, July, 1897

<sup>2</sup> *Ancient Law*, 4th Am. ed. 67

<sup>3</sup> *Ibid.*, 71

gist and sociologist he had done more than any other thinker to enable us to understand that, since all organic cohesion is conditioned by growth, a policy of ceaseless activity is absolutely necessary, as a fact of social psychology, if any political co-operation is to be kept up <sup>1</sup>

This accords with the facts of the life about us. The conditions that produce a statute have begun changing before it is enacted. Our day watches a rapidity of change far, far greater than any the world has ever before seen. There is no phase of social activity, almost no phase of human knowledge, where the last hundred years have brought no revolution. Take that field of thought in which human instincts most combat change — the field of theology — and contrast the beliefs of a hundred years ago with those of to-day concerning the nature of eternal punishment, the verbal inspiration of the Old Testament, the history of the creation of the world. Or read the books of travel written by our visitors from abroad in the generation ending with Dickens. Or ask anybody who fought in the Civil War to tell you about his boyhood. Or look into the scientific text-books studied in youth by men now grey-headed.

#### CONSEQUENCES OF PRESSURE

Two results spring from the rapidity of change, first that new problems are always crowding for attention, and secondly that the statute-books abound in obsolete provisions awaiting repeal. Do not imagine it a condition peculiar to our own day when the world moves so swiftly. Helvetius records that fifty years after the philosophy of Aristotle was forgot, the Parliament of Paris revoked the punishment of death decreed to every one who should teach any other. That the decisions of any group of men are likely to be equally backward is illustrated by the further statement of Helvetius that the faculty of medicine admitted the doctrine of the circulation of the blood fifty years after its discovery by Harvey, and that the same faculty admitted potatoes to be wholesome one hundred years after they had so been proved by experience, and when Parliament had revoked the *arrêt* that forbade the use of the tuber <sup>2</sup>

The truth of the matter is that Legislatures are always behind the times, never ahead of them. Dicey gives an ingenious ex-

<sup>1</sup> "Nature of Political Majorities," *Pol. Science Q'y*, vii, 131

<sup>2</sup> *On Man and His Education*, II, 306 (Hooker transl.)



planation of how it is that the thought or sentiment of yesterday governs the legislation or the politics of to-day. He says that lawmaking in England is the work of men well-advanced in life; the politicians who guide the House of Commons, to say nothing of the peers who lead the House of Lords, are few of them below thirty, and most of them above forty years of age. They have formed or picked up their convictions, and, what is of more consequence, their prepossessions, in early manhood, which is the one period of life when men are easily impressed with new ideas. Hence English legislators retain the prejudices or modes of thinking which they acquired in their youth, and when, late in life, they take a share in actual legislation, they legislate in accordance with the doctrines which were current, either generally or in the society to which the law-givers belonged, in the days of their early manhood.<sup>1</sup>

The conditions that Dicey depicts are not peculiar to England. We share them. Nobody can have watched an American Legislature without observing how much are the greater part of its elderly members out of touch with the thought of the day as embodied in the more serious periodicals, to say nothing of the recent books. Few legislators and fewer statesmen can find time or strength for miscellaneous reading. The omnivorous Theodore Roosevelt was phenomenal — the rare, very rare exception. Most men in public life have only the inspiration drawn from the literature of their youth. Circumstance conspires with age to prevent the acquisition of new ideas.

Meanwhile the busy world is evolving new problems with every rising of the sun. New evils call for new cures. That was a wise thing the General Court of Massachusetts Bay put into the preface of the revision of the laws published in 1660, referring to the codification of 1649: "The former Epistle tells you there would be need of alterations and additions, and experience doth witness the same, for while men either through ignorance or enmity, deny or oppose principles and actions of Righteousness, the preservation of humane Society will necessitate the enacting of new Lawes, or alteration of old, to fit the remedy to the disease, So it hath been in former ages, *ex malis moribus bonae leges*."

The novelty of the evils makes the cures necessarily experimental. There must be many trials before complete remedy is

<sup>1</sup> *Law and Opinion in England*, 34

found Furthermore, the ever-changing conditions make the cure a temporary expedient Even the ultra-conservative Buckle recognized this, although it is doubtful if such was his intention when he set forth certain lessons of history "that ought to moderate the presumption of legislators, and teach them that their best measures are but temporary expedients, which it will be the business of a later and riper age to efface."<sup>1</sup> He thought the only safe course for the legislator is to look upon his craft as consisting in the adaptation of temporary contrivances to temporary emergencies In his belief the legislator ought clearly to understand that it is not within his function to anticipate the march of affairs and provide for distant contingencies.

If legislation is an experimental science, it must be gradual and consecutive, proceeding step by step. Surely in this respect the lawyers ought not to complain if the steps are many That has been precisely the way with the judge-made law Its huge mass is the result of ever-broadening precedent So it is and ought to be with statute law An act is passed, usually a special or private law, to meet some particular and more or less exceptional condition Thus the germ of a principle is recognized. The principle spreads as the need for its application grows. Found beneficial in one direction, its use in some other direction suggests itself Sooner or later a general law results

This not only explains but also in some measure justifies what is often spoken of with an air of blame, as piecemeal legislation. Dicey calls it hand-to-mouth legislation, and says it is the inveterate preference of Englishmen<sup>2</sup> In his treatment of it there is a shade of inconsistency, for on one page he says its causes are indolence and ignorance rather than any desire for scientific experiment, and on another he lays it to the habitual conservatism to be found even among ardent reformers when leaders of Englishmen, and to the customs of their parliamentary government My own observation of legislators inclines me to think that timidity, rather than indolence or ignorance, creates in part the mental attitude, but that often coupled with it is an instinctive preference for experimental progress. Dicey thinks Parliament favors gradual legislation from failure to perceive that a law which produces at the moment a very limited effect may involve the recognition of a principle of unlimited application.

<sup>1</sup> *Hist of Civilization in England*, Am ed 1865, I, 361

<sup>2</sup> *Law and Opinion in England*, 28, 45

Yet it may be doubted whether in this respect Parliament differs greatly from American legislative bodies, where in debate it is certainly no rare thing to hear an opponent depict the extreme to which a new principle may be carried. In fact, that is a favorite way of attack. The answer usually is that no great harm can come from a limited trial.

As a result, no Legislature ever looks on anything as settled, finished, complete. My observation tallies here with that of Judge Lowell, who found the existing law always to be a temporary compromise — a short step to be followed as soon as possible by another.<sup>1</sup> In this he saw two evils. It keeps the community in constant unrest, and, as each fragment of legislation takes nearly as much time as the passage of a compromise measure should take, sessions are lengthened to a maximum and constructive legislation is reduced to a minimum. He says there is very little hope that any comprehensive system can be established except by a long process of attrition, which must consume an incalculable amount of legislative time. That these are evils, I should on the whole agree, but it is fair to say that they are in part balanced by advantages. The process ensures the protracted study necessary for perfection, and it secures a degree of public knowledge, sympathy, and approval that would not otherwise be attained and that helps to make the application of the law a success. Yet no other aspect of legislative life so disheartens an earnest man of constructive habit, ambitious to serve his fellows. It taxes patience to the utmost and calls for the extreme of perseverance. On the other hand, it makes ultimate success all the more precious.

On the rare occasions when some crisis or other exceptional condition permits a comprehensive enactment, need for its alteration begins to appear as soon as it is put in force, for the reason that to anticipate all the bearings and impacts of a new law, is beyond the power of the human mind. The new law runs afoul of wholly unexpected contingencies. It works injustices that can and should be rectified. This means another statute and then another and so on until perfection is approached or the law becomes obsolete. Furthermore, such are the conditions of legislative work that technical excellence at the start is altogether unlikely. The lack of time to do the work properly, the frequent lack of technical assistance for lawmakers almost

<sup>1</sup> "Legislative Shortcomings," *Atlantic Monthly*, March, 1897.

wholly without technical training, the necessity for compromises in matter of detail — these are among the reasons why the original technique of the statutes is imperfect

In this there is no ground for individual blame. The fault is inherent in democratic institutions. That our representatives may mirror society, we accept certain inconveniences. As a result we entrust our lawmaking to all sorts and conditions of men, farmers, tradesmen, manufacturers, wage-earners, lawyers good, bad and indifferent, and we ask them to grapple with problems ever becoming more complex, often far beyond the capacity of the ordinary member, sometimes beyond the capacity of the ablest member. Grudgingly and to but small degree do we call in expert help. For the sake of getting agreement, we make compromise and conciliation the very essence of the work, and these are in themselves inconsistent with perfection.

Another reason for change is to be found in the difficulties due to the limitations of language. What the lawmaker says, may not mean to others what it meant to him. Do not for a moment suppose this necessarily implies either ignorance or carelessness. Although uncertainty may have resulted from either of those defects, yet neither may have played a part. Skillful men writing with the utmost care documents of various kinds are constantly perplexing the courts with the issues that result, and no small part of the work of a judge is to interpret and construe. Many a change in the statutes is made necessary by the effect of judicial interpretation. For this it is no more fair to blame the Legislatures than the courts. As Judge Baldwin has observed, when reason is set to work upon the solution of a problem growing out of the affairs of daily life, it often happens that two minds will pursue different paths and perhaps come to different results. Not infrequently neither result can fairly be pronounced untenable. An English judge has said that nine tenths of the cases which had ever gone to judgment in the highest courts of England might have been decided the other way without any violence to the principles of the common law.<sup>1</sup>

A Massachusetts Governor, David I. Walsh, vetoing a liquor transportation bill, quoted the Attorney General of the State as advising him that although a certain construction of it was hardly probable, yet the question was one on which the minds of men might fairly reach different conclusions, and he could not

<sup>1</sup> *The American Judiciary*, 54

predict with confidence that his view would be taken by the Supreme Court. The number of statutes that actually do require judicial exposition, explains at least one class of amendatory statutes.

Still another variety of change is that by way of what might be called lawmaking on the descending or contracting scale. This is the reverse of the normal process whereunder law expands from the specific to the general. Occasionally a law will be made too broad, taking in, as it proves, many things that ought not to be within its scope. Then it has to be narrowed. Perhaps it needlessly creates a borderland of doubt, making rights and duties uncertain. As this is disclosed by experience, limits must be more sharply defined.

Governor Warren T. McCray, speaking of the 194 laws enacted in the recent session of the Indiana Legislature, said that of the ninety or more of a general nature, fully three fourths were designed to correct existing laws that had in some minor particular proved defective in their operation.<sup>1</sup> Possibly this ratio would not be found to be an average, but unquestionably adjustments of administrative machinery account for a material part of the volume of lawmaking by the State Legislatures. That, however, is not true of the work of Congress. Indeed, one of the serious criticisms to be made of the national legislature is that it refuses to reform its procedure so that there may be time to keep up to date the laws controlling administration.

Both Congress and the Legislatures are neglectful and remiss in not repealing moribund and dead laws. They clog the statute books. Retention does no great harm, but they are a nuisance; it does little good to endure. When there are general revisions of the body of statutes, it would be easy to prune, but for the most part the Legislatures and Congress are unwilling to give any amending authority to the committees that do the real work and will not give of their own time to cutting out the dead wood. One remedy, proposed by John Locke and afterward advocated by Thomas Jefferson, would be a time limit put into statutes when enacted. This would abrogate them after say twenty years unless then re-enacted.<sup>2</sup> Perhaps Legislatures and Congress could be kept from re-enacting *en bloc* at every session the expiring laws.

<sup>1</sup> *Illinois Journal of Commerce*, August, 1923.

<sup>2</sup> See *Legislative Procedure*, Robert Luce, 500-93.

It is not true that the volume of laws changing social relations is large. On the contrary the rights, privileges, and duties of citizens in point of principle are little changed from year to year. For example, of 767 laws enacted by the Illinois Legislature in two sessions (1917, 1919) only 31, about four per cent, related to purely private rights, the other 96 per cent relating to State and local administrative matters and to appropriations. Professor John Dickinson analyzed the statutory output of the Pennsylvania Legislature of 1929<sup>1</sup> He found that it filled a volume of more than 1800 pages, with a total of 601 acts, 362 of which related to the organization and conduct of the government of the Commonwealth and had practically no bearing on the activities and interests of private individuals. Also there were thirty tax statutes. Professor Dickinson roughly described about half the remainder as regulatory, and the rest as amendatory of the basic corpus of general law. He found the vast majority of the regulatory statutes to be amendments and, for the most part, comparatively brief amendments of existing regulatory legislation, involving a slight modification of existing requirements rather than an addition of new requirements, and as to the rest his conclusion was that the corpus of private law as a whole, the corpus of law which governs the great mass of commonplace everyday dealings of the business world, is only slightly affected by the output of even a legislative session so prolific in the total number of its enactments as that of the Pennsylvania Legislature of 1929.

<sup>1</sup> "Legislation and the Effectiveness of Law," *Am Bar Assn Journal*, October, 1931

## CHAPTER XXIV

### MODERN TENDENCIES

"THE WEALTH OF NATIONS," published in the year of the American Declaration of Independence, expounded a system of political philosophy that markedly influenced the lawmaking of all English-speaking peoples for a century or more. Smith's doctrine, elaborated and preached by Bentham, Austin, James Mill, Malthus, Ricardo, Grote, and John Stuart Mill, came to be part of the education of every English and American youth who included political economy in his studies, and working powerfully through colleges and universities, moulded public thought. Although primarily applied to questions of economics, ultimately it was carried to the core of political science, and must be reckoned with accordingly.

Smith held that every system which tries, either, by extraordinary encouragements, to draw toward a particular species of industry a greater share of the capital of society than would naturally go to it, or, by extraordinary restraints, to force from a particular species of industry some share of the capital that would otherwise be employed in it, is in reality subversive of the great purpose it means to promote. Instead of accelerating, it retards the progress of society toward real wealth and greatness. Upon taking away all systems of preference or restraint, the obvious and simple system of natural liberty establishes itself of its own accord. Every man, so long as he does not violate the laws of justice, is left perfectly free to pursue his own way, and to bring both his industry and capital into competition with the industry and capital of any other man, or any order of men. The sovereign is completely discharged from a duty, in attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever suffice — the duty of superintending the industry of private people, and of directing it toward the employments most suitable to the interests of society.

Bentham, expanding this to cover all social relations, concluded that if every man, acting correctly for his own interest, obtained the maximum of obtainable happiness, mankind would reach the millennium of accessible bliss, and the end of morality — the general happiness — would be accomplished. The inter-

est of the community, he believed, is the sum of the several interests composing the community. Ricardo and the others who developed what in time came to be known as the Manchester school, accepted the logical deduction that the competitive forces uncontrolled are wholly equal to regulating satisfactorily the entire social process. No English phrase seeming to describe this doctrine adequately, the idiomatic "laissez faire" was imported from France. "Let alone" is the nearest to it in English.

The theory is that if the government does not interfere with the individual citizen, he will work out his own salvation to the common good. Economic ills will cure themselves. Men are not to be responsible to or for each other. The less law the better, and that government is best which governs least. The ideal would be absolute non-interference with men in the pursuit of gain. The chief purpose of the State would be to protect men in their possessions. As Buckle put it in his "History of Civilization in England,"<sup>1</sup> "to maintain order, to prevent the strong from oppressing the weak, and to adopt certain precautions respecting the public health, are the only services which any government can render to the interests of civilization." Even this went farther than the slight concessions made to the State by such individualists as Herbert Spencer, who held that every man should be free to do what he will, provided he does not infringe the equal freedom of any other man. From this it is no great step to the position of the philosophical Anarchists, who would dispense with laws altogether.

History was ransacked to show the harm wrought by authority. It was recalled that Tacitus had said, "When the State is most corrupt, then the laws are most multiplied." Harrington, quoting this in his "Oceana," had pointed out that Solon made few, Lycurgus fewer laws, and that Rome by the testimony of Cicero was best governed under those of the Twelve Tables. "You will be told," said Harrington, "that where the laws be few, they leave much to arbitrary power; but where they be many, they leave more, the laws in this case, according to Justinian and the best lawyers, being as litigious as the suitors." Buckle declared the historian was bound to bring against every government that had hitherto existed, the accusation that it had overstepped its proper functions and at each step had done incalculable harm. He believed that as knowledge was becoming

<sup>1</sup> I, 203, Am. ed., 1865



more diffused and as an increasing experience was enabling each successive generation better to understand the complicated relations of life, just in the same proportion were men insisting upon the repeal of those protective laws the enactment of which was deemed by politicians to be the greatest triumph of political foresight. Recurring to the subject he averred (II, 157) that whenever politicians attempt great good, they invariably inflict great harm. Overaction on one side produces reaction on the other, and the balance of the fabric is disturbed. By the shock of conflicting interests the scheme of life is made insecure. New animosities are kindled, old animosities are embittered, and the natural jar and discordance are aggravated, simply because the rulers of mankind cannot be brought to understand that in dealing with a great country they have to do with an organization so subtle, so extremely complex, and withal so obscure, as to make it highly probable that whatever they alter in it, they will alter wrongly, and that while their efforts to protect or to strengthen its particular parts are extremely hazardous, it does undoubtedly possess within itself a capacity of repairing its injuries, and that to bring such capacity into play, there is merely required that time and freedom which the interference of powerful men too often prevents it from enjoying.

On the Continent similar ideas came to the surface. Typical were the views of William von Humboldt, the great philologist, who influenced political thought by a work he wrote as a young man, at the time of the French Revolution, though it was not published until 1851. His leading principle was that the highest aim of every man is the most extensive and symmetrical cultivation of his powers in their individual peculiarities, and that to attain this end freedom of action as well as diversity of situation is necessary. He drew the conclusion that the State must abstain from all care for the positive welfare of the citizens, and take no step for their security against each other and against external enemies beyond what is necessary. Furthermore the State ought to abstain entirely from all efforts, direct or indirect, to act upon the character and morals of the nation, except so far as this is the unavoidable consequence of its otherwise absolutely necessary measures, and that everything promotive of such action, particularly all especial oversight of education and religious institutions, laws against luxury and the like, are entirely outside the limits of its efficiency.

In Germany such views made little headway against paternalism, the system that sees in the State a provident father. On the other hand in England and America the laissez-faire doctrine found a fruitful field. It is natural that individuals, and especially classes, should incline to those political doctrines that bring them benefit. However generous and patriotic men may mean to be and indeed may think themselves, self-interest unconsciously warps their judgments and shapes their prejudices. In Germany the Hohenzollerns and their advisers felt that a paternalistic State alone could weld the petty principalities into a powerful nation, bringing wealth and gratifying ambition. Accident turned English faces in the opposite direction. The rise of Puritanism, the growth of a strong middle class, the follies of the Stuarts, the chance that made the first two Georges stupid men with little knowledge of the language spoken by the land they nominally governed, the opportunities for great gain brought to adventurous spirits by the exploitation of the East and West Indies and the development of the American colonies — these and other influences turned the dominant of England into individualists, for that meant personal advantage. The restraint on individual activity, manifested in various petty ways during the Middle Ages, gave place in the eighteenth century to a liberal toleration and in the nineteenth to a whole-hearted acceptance of the theories of the Manchester school.

In America the conditions were even more favorable to the individual. Colonial life inevitably bred independence, both political and personal, for men had to be self-reliant in order to exist. At the outset of course there had to be much of novel lawmaking, for the situation was novel. It is not surprising to find the Fundamental Orders of Connecticut (1638-39) saying the inhabitants were to be summoned "to meet and assemble themselves together to elect and chuse certain deputies to be att the Generall Courte than following to agitate the afayres of the commonwealth." These affairs had to be agitated, and they were men of temper to do it. John Winthrop in his "Arbitrary Government Described" (1644) boasted of Massachusetts Bay: "England is a State of long standing, yet we have had more positive & more wholesome Lawes enacted in our shorte tyme, than they had in many hundred yeares" <sup>1</sup>

By the context, however, it is clear he had in mind criminal

<sup>1</sup> *Life and Letters of John Winthrop*, II, 446

laws and penalties There was no great amount of constructive legislation of other sorts anywhere in America until long after the Revolution The circumstances of revolt tended to emphasize the love of personal liberty, and although for a few years after the Constitution made us a nation, the national government was controlled by the Federalists, the men who believed in centralized authority, they were speedily overthrown by those who came to be known as Democrats The party formed by Jefferson and entrenched by Jackson made individualism the corner-stone of its faith, and for a century fought its battles on such issues as States' Rights, home rule, personal liberty, free-trade, non-interference The history of politics furnishes few more singular and striking episodes than that of the reversal of this position at the end of the century

Almost coincident therewith was the downfall of the laissez-faire school in England To be sure, in that particular application of its theories known as Free Trade it seemed still to have vitality, but the collectivistic legislation put through by Lloyd George showed that the heart had gone out of the philosophy preached by Smith and Bentham and Ricardo and the Mills. Indeed there has come to pass what may fairly be called political revolution, peaceful, quiet, undramatic, gradual, yet none the less a subversion of governmental policy even though without change in the form of government itself

This was officially recognized in a noteworthy report in 1931 by a Committee on Finance and Industry headed by Lord Macmillan and including in its membership men high in public life with others conspicuous in private stations having to do with social problems. Said this Report. "The most distinctive indication of the change of outlook of the government in recent years has been its growing preoccupation, irrespective of party, with the management of the life of the people A study of the Statute Book will show how profoundly the conception of the function of a government has altered. Parliament finds itself increasingly engaged in the legislation which has for its conscious aim the regulation of the day-to-day affairs of the community, and now intervenes in matters formerly thought to be entirely outside its scope." <sup>1</sup>

In the United States the same change had been in progress for a generation when the severe business depression that began in

<sup>1</sup> *Cmd. Com. 3897 of 1931*, Part 1, Ch. 1, par. 8, pp. 4 and 5.

1929 led to a sudden and long jump in collectivism. At their first opportunity, in 1932, the people elected a new President pledged to give them a "New Deal." It mattered not that he was the candidate of a political party that had its birth more than a century and a third before in the wish that the rights and privileges of the individual should be paramount. A majority of the voters wanted change and hoped a new central government in Washington would help them out of their plight, regardless of party tradition and political theory. The result was a prompt extension of collectivistic practice at which Thomas Jefferson and his followers would have stood aghast. Invasion of personal liberties, transfer of duties from the States to the nation, governmental financing of joint activities — the three great avenues toward centralized control, with autocracy just beyond — these were crowded with marching throngs that inside of two years added a hundred thousand or so to the names on the Federal payrolls.

Stimulated by abnormal conditions, this was, however, in natural sequence to previous steps toward collectivism. How in both England and the United States had this come about?

Unrestrained competition had overreached itself. On the one hand it bred private fortunes so huge as to be a menace, on the other hand it bred a poverty-stricken working class teeming with miseries. Men began to ask each other if competition unmitigated by the interference of government did not too much help the strong, too much oppress the weak. Might not Society, through its organization, the State, wisely correct the situation? What, indeed, was the real function of the State? Locke had said that the end of government is the good of mankind.<sup>1</sup> Edmund Burke had repeatedly so argued. "I was persuaded," he wrote in 1777 to the Sheriffs of Bristol, "that the government was a practical thing, made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians." In his "Reflections on the Revolution in France" he had said: "Government is not made in view of natural rights, which may and do exist in total independence of it. Government is a contrivance of human wisdom to provide for human wants." And again, in the same essay: "Society is a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection. As the ends of

<sup>1</sup> *Of Civil Government*, Book II, 229.

such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living and those who are dead, and those who are to be born "

The revival of these sentiments came to win the approval of serious men as they studied the facts and needs of society. Some concluded that no arbitrary bounds can be set to the field of lawmaking. "The sphere of the State," declared President Woolsey, "may reach as far as the nature and needs of the man and of men reach " <sup>1</sup> Sir J. R. Seeley took a like view. "I treat government not as a conscious contrivance," he says, "but as a half-instinctive product of the effort which human beings make to ward off from themselves certain evils to which they are exposed. If then you ask, How much government ought we to have? the only answer I can give will be, You not only ought to have but you infallibly will have as much government as is necessary for this purpose." <sup>2</sup> Professor J. Q. Dealey thinks along the same lines. "Protection," he avers, "is not only defense against positive aggression of a hostile foe, but denotes also a parent-like care which shields against every possibility of harm. Not merely the securing of physical existence but also the fostering of mental and spiritual life is within the scope of the state." <sup>3</sup> And Professor W. W. Willoughby declares: "The State is justified by its manifest potency as an agent for the progress of mankind " <sup>4</sup>

The corollary of larger scope for the State must be greater interference with the individual, and this implies denial of the laissez-faire doctrine. Huxley was one of the first thought-shaping men of science to see the new light. "The higher the state of civilization," he concluded, "the more completely do the actions of one member of the social body influence all the rest, and the less possible it is for any one man to do a wrong without interfering more or less with the freedom of all his fellow-citizens. So that even upon the narrowest view of the functions of the State it must be admitted to have wider powers than the advocates of the police theory are disposed to admit " <sup>5</sup> Of recent writers who have carried out this thought, two may serve to illustrate. Professor Willoughby says: "With the social life of

<sup>1</sup> *Political Science*, 1, 216.

<sup>2</sup> *Introduction to Political Science*, 129.

<sup>3</sup> *The Development of the State*, 60.

<sup>4</sup> *The Nature of the State*, 112.

<sup>5</sup> *Critiques and Addresses*, 11.

men, antagonism between their respective interests and spheres of activity is an absolute necessity. Complete freedom of every one to do as he likes is, therefore, out of the question. The only question is, whether these conflicts shall be settled by the particular strength given by Nature to each individual, or whether the compulsion shall be supplied by a general authority created by a union of strengths."<sup>1</sup> And Professor George L. Scheiger says "None of the so-called Rights of Man are absolute rights. Public expediency may and does demand their restriction. The good of the State must ever go before that of the individual. The State alone can determine what rights its members shall enjoy. It knows them not as men, but as citizens. It cannot allow its citizens to appeal to inalienable natural rights, for in that case the individual, not the State, would be recognized as sovereign."<sup>2</sup>

Nevertheless, for one, I hold to the opinion that individual rights and liberties should yield only to evident, overwhelming need. I agree with the Macmillan Report that has been cited, when it says "It is of vital importance that the new policy, while truly promoting liberty by securing better conditions of life for the people of this country, should not, in its zeal for interference, deprive them of their initiative and independence which are the nation's most valuable assets."

Let us examine more closely the recent legislative aspects of what the Macmillan Report described as the age-long conflict between liberty and government.

#### WELFARE AND UTILITY LAWS

A century ago men talked chiefly of rights. To-day they talk chiefly of duties. A century ago government was looked on chiefly as an enemy, necessarily bad — the less of it the better; to-day government is looked on chiefly as a friend, potentially good — to be used as much as possible.

The transition from one viewpoint to the other has been marked by that great increase in the activity of lawmaking bodies which is so much reprehended. This activity has taken two forms, which I shall try to discriminate by describing as welfare laws and utility laws, for the want of more accurate terms. By welfare laws I mean those that with a view to the common

<sup>1</sup> *The Nature of the State*, 109

<sup>2</sup> *The Evolution of Modern Liberty*, 7

welfare affect the relations between citizens By utility laws I mean those that provide utilities for common enjoyment

Welfare laws were born of the great social changes that followed the upheavals due to the American and French Revolutions, the Napoleonic wars, the factory system, the growth of cities, scientific discoveries, and the opportunities brought to democracy by the American Constitutions and the English Reform Act of 1832 One line of development was distinctly ethical, taking shape in the movements for abolishing slavery, suppressing the liquor traffic, securing to women equal rights with men, protecting children, alleviating the conditions of labor, restraining monopoly, and in general using the common power to control the strong and help the weak Another line of development was more material, including in its scope the laws meant primarily to increase the joint power and common wealth of the country Here the conspicuous illustration is the protective tariff So far, indeed, have we gone in this direction that we find one of the leading men of affairs in the United States, James B. Duke, long President of the American Tobacco Company, beginning a magazine article on "Politics and Prosperity" by saying "While business prosperity is not the chief concern of individuals, the bringing about and maintenance of conditions essential to business prosperity is the chief concern of modern governments"<sup>1</sup> This dictum would be strongly disputed in some quarters, but it is at any rate significant

Welfare laws have occasioned far the greater amount of political controversy, yet their volume has been far less than that of the utility laws of our time Failure to appreciate this has been the chief crime of the critics Looking only at the size of the statute books, they have jumped at the conclusion that changes in substantive law are numerous and that there is constant interference with the accustomed relations between men The fact is that the great bulk of current statute law is not genuine law at all, but consists of rules and regulations for carrying on public business James C. Carter well explained the distinction by pointing out that when the State *commands* something to be done, for instance, when it commands its officers to cause a prison, courthouse, or other public building to be built, it does not make law in the proper sense of law It affects the conduct of the person it commands, but in no other sense than that in

<sup>1</sup> *North American Review*, April, 1915.

which the conduct of a soldier is affected by the command of his superior officer. It is a *particular*, not a *general*, command. Mr. Carter pointed out that the written provisions for such matters are not essentially different from the minutes of ordinary corporate bodies recording their action. He thought these public records should be called *public law*, in contradistinction to *private law*, by which he would describe the rules relating to private conduct. The terminology does not seem to me altogether happy, for the word "private" thus applied is likely to confuse.<sup>1</sup> Sir Courtenay Ilbert has suggested the phrase "lawyer's law" to describe the kind of laws about which jurists are in the habit of speaking and writing, that is to say, the legal rules relating to contracts and torts, to property, to family relations, to succession and inheritance, as well as the law of crimes.<sup>2</sup>

Whether it be called "private law" or "lawyer's law," it is the minor matter nowadays. Ilbert testified that it is not the kind of law with which Parliament is chiefly concerned. He says the bulk of the members are not really interested in it, and that the substantial business of Parliament is to keep the machinery of the State in working order. Of the American situation Carter went so far as to aver it to be substantially true that the whole vast body of legislation is confined to what he called Public Law, and he not only declared the same to be true of the Statutes at Large of Great Britain, but also said we should find the same result if we examined the legislation of Rome in the classic era of jurisprudence. I doubt if so extreme a statement is justified, at any rate regarding modern legislation, for welfare laws of general application and going beyond mere commands for the performance of specific acts, are not rare, but there can be no question that utility laws greatly preponderate.

Utility laws spring from recognition by civilized men of the fact that there are many desirable things which they can achieve by joint action, that they could not achieve at all or could not so well achieve by individual action. Undoubtedly the first discovery was that the effective conduct of war and defense called for joint action, and so from the earliest days of recorded history States have maintained armies. At times, as it was during the recent Great War, the military and naval provisions, with the civil interferences attending, are far and away the most important feature of legislation.

<sup>1</sup> *Law Its Origin, Growth, and Function*, passim.

<sup>2</sup> *Legislative Methods and Forms*, 209.



The next group of joint activities to develop was that relating to what we call public works. The temples of antiquity, the glorious ornaments of Athens, the highways and harbors of the Roman Empire, the amphitheatres, the forums, the bridges, were but the precursors of the joint undertakings that to-day consume far the greater part of the public revenues and produce far the greater part of the statutes. We have but expanded the scope of these activities. To streets, pavements, water supply, sewers, light, police, fire protection — all ancient needs now multiplied in proportion to the growth in urban population, to courts of justice, to record offices, to prisons, to the machinery of public finance, — we have added libraries, parks, boulevards, postal service, in some places irrigation, communication, transportation, with a great variety of minor utilities, and most extensive and costly of all, the education of the young. In 1932 the total expenditure for public schools in the United States was calculated to be \$2,174,650,555. This was within about five per cent of the total expenditure of the Federal Government for the same year. Except in the New England States the free public school system dates back barely seventy years. It may be said, then, that in the last two generations we have in this one particular created a governmental function, hitherto State and local in its handling, that, as measured in dollars, had before the Great War reached a magnitude nearly equal to that of all the national functions put together.

Both welfare and utility laws are increased in volume by the mere growth in population. This is not markedly the case with private law, the lawyer's law, which is confined to general principles that in theory at any rate might apply to all the inhabitants of any one country, irrespective of their number or situation. In the case of welfare and utility laws, however, the shifting of predominance that accompanies growth, from the rural to the urban population, the tendency to the sub-division of labor, and particularly the numerical increase of occasions for making exceptions to general rules, combine to swell the volume of legislation. Administrative law most feels the effect of increase in population. It is with public business as with private business. A railroad requires vastly more of rules and regulations for the control of its employees than a coach line required. A modern factory with several thousand workmen is a far more complicated affair than the workshop of half a century ago employing but a few score.

Whatever ought to be the case theoretically, in practice it is certain that numbers breed laws. Therefore you may find one source of the growth of legislation in the fact that when the Union was formed, it had a population of less than four million, and now has a population of more than one hundred and twenty million. New England to-day is more populous than was Old England when Massachusetts Bay became a province, in 1691. There are more persons in the State of New York now than there were in England and Wales at the opening of the nineteenth century. The population of New York city to-day is greater than was the total population of the United States in 1800. Pennsylvania has more inhabitants than there were in all the United States at the time of the War of 1812. There are more persons in California than there were in the thirteen colonies when they declared their independence, more between the Sierras and the Pacific than there were between the Alleghenies and the Atlantic when the Constitution was penned. Taking the country as a whole, its Frame of Government meets the needs of more than twenty-five times as many human beings as there were within the confines of the States by which it was adopted.

Furthermore, the capital of the concern, in other words the aggregate wealth of the people, has grown yet faster than the population, almost incredibly faster. The per capita wealth in this country as shown by what is reported as the true valuation of real and personal property, was, in 1850, \$307.69, in 1932, it was estimated to be \$1981. As the resources of the people have increased, it has been inevitable, natural, legitimate, that they should be willing to expend more collectively.

The figures relating to national expenditure illustrate what has taken place. In 1810 the inhabitants of the United States contributed \$1.17 apiece for the ordinary disbursements of their national government, in 1860 (before the Civil War had affected the cost), \$2.01, in 1910, \$7.30. (Payments for premiums, principal of public debt, and postal service paid from postal revenues, are deducted in getting these averages.) It will be seen that the per capita cost of national government did not quite double in the half century from 1810 to 1860, that it grew nearly seven-fold in the full century. In that same century the total of ordinary disbursements grew from \$8,474,753 to \$659,705,391 — almost eighty times as great at the end as at the beginning of the hundred years. This means that before the abnormal conditions

brought about by the Great War, Congress was managing a business almost eighty times as great as the business confronting the Congress that sat in the years just before the War of 1812 — apart from the postal service with its revenue of \$224,128,658 in 1910 as against \$551,755 in 1810. Add the postal service and the growth of the century was about one-hundred-fold. From the time of the outbreak of the Civil War to that of the Great War, a little more than half a century, the public business of the nation grew by nearly fifteen-fold. In the fiscal year 1933-34 the general expenditures amounted to a little more than three billion dollars, the emergency expenditures to a trifle more than four billions. The States in 1932 expended about \$2,505,833,000; counties, cities, towns, villages, and boroughs almost exactly twice as much.

One effect of all this is that the character of legislative work has greatly changed. The ever increasing proportion of administrative detail lessens the opportunity for considering basic policies and abstract proposals. In Congress as in Parliament this is particularly noticeable. The new Congressman finds distressingly little occasion to study fundamental questions. The big appropriation bills hold the center of the stage, and most of the other matters that get serious attention involve no question of principle. In the State Legislatures a like situation has long prevailed. As far back as when Charles Francis Adams the elder sat in the Massachusetts General Court, where he served five terms, he wrote: "After all, the legislation of one of our States is a fatiguing business — there is a large amount of small topics of detail."<sup>1</sup> To-day the work has even less of attraction for the man who loves important problems of theory.

There are those who apparently think the situation normal and not likely to change. Thus Moorfield Storey in an address as President of the American Bar Association said in 1895: "Everywhere our legislatures are occupied, not with fundamental questions of government, but with the refinements of civilization." That may be granted without accepting what Mr. Storey went on to say: "The essential principles are settled, the general scheme is complete. It is with the details of organization — with perfecting the machinery of civic life that the American legislature is now occupied." Unless the governmental changes concurrent in the Old World with the end of the Great War yet

<sup>1</sup> C. F. Adams, *Charles Francis Adams*, 46

fail to find any echo in America, it may very well be questioned whether the essential principles are settled and the general scheme is complete. That of late, however, our legislatures have been occupied with perfecting the machinery of civic life, is a truth their critics would do well to appreciate.

#### GROUP ACTION

Departure from traditional parliamentary forms and processes is in the making. Most significantly it appears in Europe where of late nearly every country has in some measure recognized group interests. The idea is not new. Mirabeau held that representative power should not be based on numbers, but on interests. Saint Simon and then Proudhon urged an economic parliament. Bismarck took a short step in that direction by creating in 1881 an advisory economic council in Prussia, to work alongside the Reichstag. Its adoption for the empire was blocked through fear that it would be a dangerous rival to the Reichstag itself. With the spirit of innovation that followed the World War the idea revived. It spread with remarkable speed and appears now to have taken root in nearly all European nations.

Thus far it has been almost wholly confined to the economic field, the concerns of production, industry, business, capital, labor. Its organs are commonly known as "national economic councils." That in Germany was among the earliest and has had the most attention. Provisionally created by a Governmental order in 1920, as authorized by the new Constitution, it had 68 representatives of agriculture and forestry, 6 of horticulture and fishing, 68 of industry, 44 of commerce, banking, and insurance, 34 of transportation and public works — all appointed by their several trade organizations, half to be employers and half employees, 36 of handicrafts, 30 of consumers, appointed by the various municipal councils and associations of the larger cities (except three by the Federal Council to represent rural communities), by associations of consumers' societies, and by associations of housewives and servants, 12 experts in economic matters appointed by the Federal Council; and 12 likewise appointed by reason of peculiar fitness or special contribution to German economic life. Total, 326. Meetings of the full council did not prove of much value and the work came to be done chiefly by committees. In its first decade more than four hun-

dred economic and social legislative projects were considered. No great effect came in the way of direct influence upon legislation, but much good was thought to result through the compiling of information and the shaping of opinion. With the crisis of July, 1931, the Council went into eclipse.<sup>1</sup>

France followed Germany in this matter in 1925, but with variation. The membership of its Council is allocated by groups in much the same way, but there are only 47 members, each with two alternates. Instead of independent existence, it is attached to the department of the Council of Ministers, thereby lacking semblance of a parliament. Its functions are restricted to informing, advising, recommending. Its chief influence has been through making researches that may help to shape social and economic policies. Its lack of effect upon legislation is said to be counterbalanced by its effectiveness as advisor to the administrative departments. There is agreement in France that it has proved its worth and should be maintained.<sup>2</sup>

More restricted still is the field of the "Economic Advisory Council" that was created in England in 1930. It was to be a standing body, the Prime Minister its chairman, some other Ministers among its members, and the other members to be an unspecified number chosen by the Prime Minister by reason of their special knowledge and experience in economics and industry. "The Manchester Guardian" thought the creation of this body went far toward removing the reproach often brought against the English system of government that "there is no regular channel through which men with ideas and experience, who are not politicians, can get into contact with the Government of the day"; and held it to be "a step in the direction of more scientific handling of economic problems — a way of making the economist appreciate political difficulties and the politician realize economic necessities." It will be seen, however, that this went little beyond giving official status and some degree of organization to such conferences as Presidents Hoover and Roosevelt later devised in the course of the depression with which they battled.

Portugal, by its Constitution of February, 1933, created a Chamber of Corporations, "charged with reporting and giving

<sup>1</sup> Lewis L. Lorwin, *Advisory Economic Councils*, 30

<sup>2</sup> *Ibid.*, 40, 42.

Also see "National Economic Councils," *Monthly Labor Review*, January, 1931.

an opinion in writing on all the proposals of bills which may be introduced in the National Assembly, before their discussion is begun therein," within thirty days or within the period the Assembly may fix if the bill is considered urgent by the Government. Failing to receive such an opinion within the thirty days, the Assembly may proceed.

By the way, this Constitution has a novel and most interesting provision bearing on the general subject of representation. It says "The State shall assure the constitution and defense of the family, as source of the preservation and development of the race, as primary basis of education, of discipline and social harmony, and as foundation of the entire political order through its aggregation and representation in the parish and the municipality." To carry this out parish boards are to be elected by heads of families, the boards to elect municipal councils, and these to elect the provincial councils.

It is needless to go into details here as to most of the economic councils of other European countries. Suffice it to say that though they have not yet become an important factor in the making of laws, taken altogether they forecast important additions to lawmaking methods.

Development of the group representation principle, however, requires more specific treatment, for what Italy is doing brings into the realm of possibilities a world-wide re-shaping of representative government.

Late in October of 1922 Benito Mussolini entered Rome at the head of a hundred thousand Fascists and took control of government. He did not believe in the accustomed forms of democracy. Rather than suffrage on the basis of personality and representation on the basis of numbers and localities, he preferred to build on occupation. Perhaps he had read Bismarck's admission in his "Thoughts and Reminiscences" that a law-making chamber representing occupations had obsessed him all his life. Mussolini did not go that far all at once, but laid the foundation by organizing the people of Italy into "corporations," an inexact name as we understand it, "guilds" giving a better description, though not fully adequate. Each was to deal with its own problems, and the chosen representatives of all, assembled in council, were to advise the government in economic and industrial matters of national scope and concern.

When it came to lawmaking, Mussolini as Prime Minister

could tell the Chamber of Deputies what bills to take up and what to pass. To this in 1926 was added power to issue decrees having the force of law. The corporations could enforce codes he had approved through fines, imprisonment, or deprivation of the right to do business.

By April of 1930 organization had been so perfected as to warrant the creation of a National Council of Corporations consisting of three Ministers, certain subordinate officials, the Presidents of the Workers' Spare Time Institute, the National Institute for Social Assistance, the Association of Disabled Soldiers, and the National ex-Service Association, one member from the directorate of the National Fascist Party, with representatives of employers and employees of the seven occupational divisions, and of the associations of public employees. The Minister of Corporations was to appoint ten technical advisers with the right to share in discussions but not to vote.

The Council works through a central corporate commission, a special permanent commission, sections and sub-sections. The central commission co-ordinates the activities of the Council, handles matters of urgent importance that may come up between the two regular meetings of the Council held in each year, and deals with national problems such as those of production. Upon its first assemblage Mussolini described it as "occupying in relation to Italian national economy the place that the General Staff occupies with respect to the Army, it is the functioning brain which draws up plans and co-ordinates all activities."

It has rule-making power. In effect its decisions are to have the force of public law, but be binding only in so far as they concern the persons, the economic matters, and the labor questions they were intended to regulate — not laws in the formal sense even though such in effect, but autonomous regulations of a technico-professional character.<sup>1</sup>

To supplant rather than supplement the Chamber of Deputies was next in order. When the National Council gathered on the 14th of November, 1934, in what was believed to be one of the most important speeches in our time and was described as "the funeral oration of capitalism and liberalism," Mussolini told the 739 persons assembled that the Chamber of Deputies would eventually be abolished. The Chamber "has never pleased me,"

<sup>1</sup> National Economic Councils," *Monthly Labor Review*, January, 1931

he said. "It is an institution that we have found to be extraneous to our mentality and to our fashion as Fascists." The common expectation is that the Chamber now sitting will be the last, ending the parliamentary system and voting itself out of office. Hence it is commonly spoken of as "the harikari" or "suicide" Assembly

At the center of the new system stands Mussolini, for all practical purposes a dictator. So in effect is an English Prime Minister, with the difference that Mussolini's power will end only with abdication, death, or revolution, while an English Prime Minister's power can be taken away from him by the established methods of the parliamentary system. A basic element of that system appears in the right of free criticism and safe opposition. Mussolini thinks that to be extraneous to Italian mentality, and therefore, the presumption is, less efficient for the welfare of Italy. Another great Italian statesman thought otherwise. Cavour wrote "I believe you can do with a parliament many things that would be impossible to absolute power. An experience of thirteen years has convinced me that an honest and energetic ministry, that has nothing to fear from revelations in the House, and is not in a humor to be frightened by the violence of extreme parties, has everything to gain by parliamentary contests. I have never felt so weak as when Parliament was not sitting ... The parliamentary road is longer but it is surer" <sup>1</sup>

The proof of the pudding being in the eating, the rest of the world will with keenest interest watch to see if the outcome determines which of these men was the wiser.

Observe that if Mussolini's novel method of lawmaking should be copied throughout the world, as he wishes and hopes, it would put an end not only to parliamentary institutions as we have known them, but also to the choice of lawmakers by universal or restricted suffrage with numbers and residence as factors. The electing units would be the members of associations that might comprise, as in Italy, as little as ten per cent of all engaged in the trade, industry, or occupation concerned, membership being voluntary. This would not seem unfortunate to those who doubt the wisdom of universal suffrage. They would be particularly pleased to see disappear from the electorate at any rate the unfortunates who make up what is known as "the

<sup>1</sup> John, Viscount Morley, *Recollections*, I, 194



submerged tenth," those who have no regular occupation if they work at all, those who are of subnormal intelligence, those who are anti-social and usually venal

Austria, in a Constitution decreed by the Cabinet of Chancellor Englebert Dollfuss, May 1, 1934, gave to Mussolini's principle a quite different framework. Lawmaking was to begin with four advisory Councils — a Council of State, a Council of Culture, a Federal Economic Council, and a Council of the Lander or Landerrat, its members to be the Governors of the eight Austrian Lander, the financial counsellors of each of the eight, the Burgomaster of Vienna, and the counsellor of his administration. A Federal Diet or Bundesrat, made up of fifty-nine members of these Councils, was to have power to approve or reject, with limited discussion and without amendment, projects of law that had been passed upon by the Councils. On rejected measures there might be a referendum. The budget and other financial measures, with sundry miscellaneous matters, were to go direct to the Diet. If that body should not act on the budget within six weeks, it was to go into effect automatically. In other matters should not the Diet act expeditiously, the Cabinet by decree might authorize whatever action it should deem necessary. Popular suffrage gave way to election by corporate groups. Democracy and parliamentarism were abandoned.<sup>1</sup>

Thoughtful men will watch with keen interest the experiments with the corporative state. As a substitute for the parliamentary processes copied from England and the United States by most of the European nations after the World War, quickly to be found unsatisfactory, it may prove to be better suited to their temperaments and habits. The idea may spread fast. That in our time it would appeal to English-speaking nations, seems altogether improbable, yet even among them the dissatisfaction with their lawmaking bodies is so great that it would not be safe to say revolutionary change is out of the question. Even now we see what may prove to have been beginnings. The agencies created to combat the depression, some of them endowed with what are really lawmaking powers, are after a fashion group representations. The ostensible lawmaking body, the Congress, has delegated to them some of its functions. Done on emergency grounds, this may result in permanent additions to

<sup>1</sup> Arnold J. Zurcher, *Am. Political Science Review*, August, 1934

our lawmaking structure. Organization of industrial groups may develop into some degree of self-government under national control, with power through codes, rules, and regulations to do various things that have hitherto been thought to be functions of the legislative or judicial branch. How far this may lead, who dare forecast?

It seems probable that in any case something permanent will grow out of the resort to expert specialists in the course of the depression. The circumstances compelled Congress to submit to organized advice. At least to the extent of allowing such advice, that may become a habit. Secretary of Agriculture Henry A. Wallace makes tentative suggestion of how it might be done<sup>1</sup>. He outlines a way of accomplishing what is in fact the purpose of the National Economic Councils of Europe, but with quite different machinery. He suggests a Council with only four members, of a character and repute utterly above partisanship and class narrowness, appointed for long terms. Its object would be to promote in the executive and legislative branches continuity of key purposes, apparently only those of an economic nature. Mr. Wallace would have it make few decisions, would keep it free from minutiae, and would not give it much of a staff.

As things go now, the nation believes that only its President views its problems as a whole. It thinks that its Congress is controlled by sectional, class, and group interests. Whether or not this belief is fully justified, it is not to be ignored. Certainly there is enough basis for it to warrant serious consideration of such proposals as those of Mr. Wallace. The President must have advisers. Congress ought to have advisers. What harm can come from having them known, recognized, official? Why not have somebody continuously studying national concerns as a whole?

Councils in the nature of a link between the legislative and executive branches are nothing new. Indeed, they were familiar in our colonial years, when they served both as upper Houses and as aids to the Governors. With the coming of independence, most of them were shorn of executive powers and became Senates. In Massachusetts there was division, the Council surviving as part of the executive branch. In Switzerland the powers are united. Says the Constitution: "The supreme direction and

<sup>1</sup> *Collier's*, February 2, 1935

executive head of authority of the Confederation is exercised by a Federal Council of seven members " One of them is chosen by the lower branch, the Federal Assembly, to be President, but it is the Council that executes. Furthermore, it legislates, not only by being the upper branch, but also by effective leadership through bringing measures forward after making their particulars public in advance.

Beginning in 1854 Jamaica tried something of the same sort. It provided that the members of the Privy Council, with not more than six others appointed by the Crown, should as a Legislative Council be the upper branch of the Legislature. At the same time it gave the legislative body a share in the work of the executive by creating an Executive Committee, consisting of one member from the upper branch and three members from the lower, who were to assist the Governor in preparing the annual estimates, in levying and disbursing the public monies, and in the general administration of the finances of the country; also whenever the Governor might direct, to perform the service of any part of the administration. They were to be in both upper and lower Houses the official organs of the Governor for all intercommunication between him and them, and for the authoritative disclosure of the policy of the Government. This scheme survived less than a dozen years. Its failure was due to lack of provision against deadlocks, to extreme partisanship and factionalism, personal ambitions, and the absence of any real body of public opinion. Several of the other islands of the West Indies copied the Jamaica plan in the same period, with like failure.

In Barbados later (1881) it was put in force in modified form and is said to have worked with more success. The conditions were different, bitter political controversy was absent, and the wishes of the majority of the House of Assembly have remained in sufficient accord with the policy of the Government to let the Executive Committee serve as a useful link. It consists of the Governor, his Executive Council, and five chosen by the Governor, four of whom must be members of the Assembly and one of the Legislative Council. They prepare the budget and have the initiative of money votes, introduce the Government proposals, and in general act like a Ministry in Parliament, but need not resign if one of their proposals is defeated.<sup>1</sup>

<sup>1</sup> Hume Wrong, *Government of the West Indies*, 68, 86

Chile has a Council of State, three of its members being chosen by the Senate, three by the Chamber of Deputies, and five by the President. Its work is chiefly that of advising the President. It must consider all the bills proposed by him and all sent up to him, and it passes on the budget. Something of the sort is found in other Latin-American countries.

Chile also has an interim committee, one that functions between legislative sessions, made up of seven members of each House, to watch over observance of the Constitution and the laws as well as administration, and in lieu of the Senate to approve appointments and removals. Some other countries have given interim committees more or less of lawmaking power. Thus in Czechoslovakia the Constitution adopted after the World War provided for a permanent committee of sixteen Deputies and eight Senators, with an equal number of alternates, who between sessions were to have the powers of a full Parliament, except that they were not to elect a President, alter the Constitution, declare war, increase military duties, dispose of state property, or change the competence of officials save by widening the scope of their activities.

In Mexico an interim committee of fourteen Senators and fifteen Representatives is to report on all pending matters so that they may be considered in the next session. The Spanish Constitution of December 9, 1931, provided for a permanent commission of twenty-one representatives of the various political groups in the Cortes, to act between sessions on cases of suspension of constitutional guarantees as well as of proceedings against Deputies, and on decree-laws the President might issue in exceptional cases requiring immediate decision.

Some of our States have recognized the desirability of inter-session work. Wisconsin led the way in 1929 by creating an "Advisory Council," to be composed of the Governor, four specified officials, and such other officers as the Governor might designate. Its whole function was to advise as to administrative details. Two years later this was importantly expanded. The name was changed to "Executive Council," the membership to five Senators and five Assemblymen, appointed as are standing committees in their respective Houses, and ten citizens appointed by the Governor without confirmation. This seems to have proved to be too unwieldy a body and two years later the membership was changed to three Senators, three Assemblymen, and five

citizens. This group is to advise the Governor, to investigate any department, institution, bureau, or division, or any agency or activity supported in whole or in part by State funds, to make studies of any problem affecting the government of the State, including studies looking to economy and efficiency, and to assign rooms for State offices, a rather small tail for so big a dog.

In 1933 Kansas and Michigan followed the example of Wisconsin. They too had suffered from the usual effect of sessions held only every two years, scant study, little deliberation, hasty action, the inevitable jam toward the end of the session, with resulting tendency to increase the power of the executive. The Legislative Councils they created were to do much the same work as that of the Wisconsin Council, but in point of details they preferred some differences. Each of them confined the membership to legislators, Kansas deciding upon ten Senators and fifteen Representatives, Michigan three Senators and three Representatives, bi-party representation specified in each case. Both, as in Wisconsin, looked not only to preparation of legislative programs, but also to investigating and improving administration, apparently without question accepting this as a proper function of the legislative branch. On the other hand they did not make their Councils advisory to the Governor.

The Kansas statute made the significant requirement that the Legislative Council should meet at least once in every three months. This suggests a doubt as to whether its members would take their work seriously. If such bodies are to cover their field, requirement of a session every three weeks would be better than every three months, indeed every week as with most City Councils would be none too often. At least they should meet as frequently as the board of directors of a big private corporation. It is hard to get the American people to understand the importance of the affairs and magnitude of the business of their public corporations, their cities, their States, their nation. With a tenth, more or less, of our gainfully employed people on the public pay roll, surely their activities deserve far more of study, watchfulness, and direction than they now receive. With the entrance upon new activities faster than ever, the need grows and grows.

## CHAPTER XXV

### CRITICS AND CRITICISM

CRITICISM of lawmakers and of laws is, always has been, and doubtless always will be, a favorite occupation of mankind. It is in the matter of government that men most often voice their discontent. Instinctively they recognize that government is, next to religion, their gravest concern. The tenets of the Church discourage criticism by extolling faith as one of the greatest of virtues, but no such bar stands in the way of examining that which for this world is foremost. What of all earthly pursuits is the most important? "Legislation," was the answer Helvetius gave.

So it comes about that laws and lawmaking and lawmakers and all they involve are the most common theme of those who by the use of pen or voice share in forming public judgments, and so it comes about that here more than anywhere else the leaders of thought shape opinion. They are not many. Always must it be borne in mind that any mass of uniform opinion has usually sprung from a few sources; if indeed more than a single source. Once let a competent observer like James Bryce pronounce judgment, and it will be copied by scores of writers, until the belief crystallizes that it is universal opinion, based on multifarious observation.

For these reasons it is particularly unfortunate that so often the men who criticize lawmaking bodies have had no personal experience therein. Much has been written by observers about the science of lawmaking, little by practitioners.

Also there is ground for regret that critics of our institutions of government so often approach them from the wrong side. All institutions, whatever they may be, should be approached with the presumption that there is, or at any rate once was, a reason for them, appealing at the time of their adoption to the common-sense of the community. Therefore the presumption should be in their favor. An institution, like a man, is to be deemed innocent till proved guilty. Yet a large number of writers approach every institution of government as if it were necessarily bad, and always assume that something better should be substituted.

Such men have a great advantage in that he who blames,

finds ready listeners, he who praises, speaks to deaf ears. Yet contrary to the need, it is the critic who makes the most noise.

Furthermore, the voice of criticism is here often strengthened by the pique of the critic. The chances are that his views have not met the approval of those in a position to apply them. Supremely confident of his own wisdom, he assumes that everybody else possessed of sanity must think the same way, and therefore that the men who have neglected his opinions, must be fools. Inasmuch as the citizen is more sure of his own judgment in matters of government than in any of the other relations of life, egotism here works the most harm.

Self-interest plays a part. The "outs" are always blaming the "ins." Whether that is one of the evils or one of the benefits of political parties, may be disputed, but no one can deny that it fosters criticism. Not only minority groups but also ambitious individuals thrive by finding fault. The most successful demagogue is the one who can damn the loudest and be the hardest. Plutarch tells us that when Marius, the plebeian soldier who rose to the heights of power in Rome, showed in arrogant, haughty speeches his contempt for the nobility, "this he did not say merely out of vanity and arrogance, or that he was willing, without any advantage, to offend the nobility, but the people always delighting in affronts and scurrilous contumelies against the Senate, making boldness of speech their measure of spirit, continually encouraged him in it, and strengthened his inclination not to spare persons of repute, so he might gratify the multitude." Such have been demagogues in all ages.

If the same tests were applied to the workings of government that are applied to all other affairs, if the same justice, the same sympathy were given, there would be less cause for resentment, but such is not the case. Men who share in making and administering the law are judged by standards different from those used for others. "As to the mistakes and failure of government," well asked Lord Pembroke, "what would private enterprise look like if its mistakes and failures were collected and pilloried in the same manner?"<sup>1</sup>

One palpable thing is that if legislative iniquities were as general as the critics think, life would be intolerable. Fortunately for our happiness, not to speak of our safety, those iniquities are the exception, not the rule. It is to be observed that in

<sup>1</sup> *Liberty and Socialism*, 39

the mass of criticisms of our Legislatures comparatively few States are specified. Critics appear perfectly at ease in accepting the shortcomings of these as typical, and generalizing from them as if their defects were universal. It may be the case that all the distressing things displayed are also to be found elsewhere, but evidence to that effect has not been presented.

Likewise in the matter of the laws it is the habit of critics to reason from the particular to the general, and because they dislike one enactment, to denounce all enactments. The fact is, that if the severest critic gives individual consideration to the statutes of any one session, judging them one by one, he will blame the Legislature in respect to only a very small proportion of them, provided a brief explanation of reasons is made to him wherever he questions. He may doubt the wisdom of this or that decision, but he will admit there were valid arguments. After examination bill by bill, he may justly censure general policies but, assuming the policies to stand, he will find his criticism of their results surprisingly small. The percentage of delinquency in detail is in fact far less than the generalizing denouncers have given the reading public to think. Here the conclusion of anybody willing to study the matter conscientiously must agree with that of Woodrow Wilson, who when he wrote on "*Congressional Government*," although discovering therein many of what seemed to him defects, frankly admitted it to be simply amazing to find how few outrageously and fatally foolish, how few of bad or disastrous, things have been done by means of what he called our disintegrate methods of legislation.<sup>1</sup>

He might with equal truth have said precisely the same thing of the State Legislatures. For this reason it may be thought unfortunate that when, while President of Princeton, he delivered a course of lectures at Columbia, published in 1908, on "*Constitutional Government in the United States*," perhaps forgetting what he had previously concluded, he should have averred that "one of the things which is most instructive to the practical student of our own government is the tendency of our legislatures, both State and national, to enact impracticable laws." A few years later an ironical Fate put this practical student of our government into the position of Governor of the State of New Jersey, where he might use the veto to check this tendency to enact impracticable laws. Yet in the two years

<sup>1</sup> *Congressional Government*, 113



during which he had this opportunity, more than 800 bills and joint resolutions were enacted in New Jersey and he exercised the veto power but ten times in one session, forty in the other. Then the impracticable laws of the nation came within the scope of his veto power, and in addition for the greater part of the time Congress was so obedient to his every wish that a preliminary expression of his displeasure would have warded off almost anything impracticable. Yet of 2486 bills and resolutions sent to him by four Congresses, he vetoed only twenty-six — a trifle more than one per cent. Somehow occasions did not seem to present themselves in any considerable number. Perhaps, after all, the tendency toward impracticable legislation may have been a figment of the professorial fancy.

Another Governor not worried by discrepancy between theory and practice was David B. Hill of New York. In the six years during which he wielded the veto power in Albany, something more than four thousand bills became laws. After he had reflected enough on his share in this product, he wrote "Legislation is being carried to excess in this country, and excesses in the body politic are equally as dangerous as excesses in anything else."<sup>1</sup> May not this have been a case of remorse?

It is easier to pardon critics who have not had a chance to put theory to the test and whose course of action has not refuted their own argument. Yet none the less must issue be taken with Professor Dealey when he says that "unwise and petty legislation is so characteristic of modern legislators that they seldom enjoy public confidence."<sup>2</sup> Much of the legislation is indeed petty in the sense that it concerns what to the general public may seem little things, though they may be of great consequence to the individuals concerned. Some day we shall be willing to devise a better way of handling them, but meanwhile as they are things that ought somehow to be done, it is doubtful if they contribute much to impair confidence. That a great part of the legislation is really unwise, may be stoutly denied.

Criticism of lawmaking bodies, as indeed of nearly all human institutions, most commonly takes the form of comparing the present unfavorably with the past. The habit was certainly familiar as far back as the days of that wise preacher who wrote the Book of Ecclesiastes, for we find him inveighing against it

<sup>1</sup> "We Are Too Much Governed," *No Am Review*, March, 1900

<sup>2</sup> J. Q. Dealey, *The Development of the State*, 141.

thus: "Say not thou, What is the cause that the former days were better than these? for thou dost not inquire wisely concerning this" <sup>1</sup> In later times a man equally shrewd and much more worldly, that crafty master of the worse side of human nature, Machiavelli, expanded the reason "Men," he said, "ever praise the olden time, and find fault with the present, though often without reason. They are such partisans of the past that they extol not only the times which they know by the accounts left to them by historians, but having grown old, they also laud all they remember to have seen in youth. Their opinion is generally erroneous in that respect, and I think the reasons which cause this illusion are various. The first I believe to be the fact that we never know the whole truth about the past" <sup>2</sup> Still nearer our day another of the great thinkers of all time, philosopher as well as statesman, Edmund Burke, took up the theme, declaring "To complain of the age we live in, to murmur at the present possessors of power, to lament the past, to conceive extravagant hopes of the future, are the common dispositions of the greatest part of mankind" <sup>3</sup>

Harriet Martineau gives a vivacious account of what she found on reaching the United States in September of 1834. A few minutes after she landed, the first gentleman to greet her informed her without delay that she had arrived at an unhappy crisis, that the institutions of the country would be in ruins before her return to England, that the levelling spirit was desolating society, and that the United States were on the verge of a military despotism. "This was so very like what I had been accustomed to hear at home, from time to time, since my childhood, that I was not quite so much alarmed as I might have been without such prior experience. It was amusing, too, to find America so veritably the daughter of England. I looked around me carefully, in all my travels, till I reached Washington, but could see no signs of despotism, even less of military.... At Washington I ventured to ask an explanation from one of the most honored statesmen now living who told me, with a smile, that the country had been in 'a crisis' for fifty years past; and would be for fifty years to come." <sup>4</sup>

<sup>1</sup> *Ecclesiastes*, 7:10 (Revised version)

<sup>2</sup> *Discourses on Livy*, bk. II, Introduction

<sup>3</sup> *Thoughts on the Cause of the Present Discontents* (1770).

<sup>4</sup> *Society in America*, I, 8, 9

Had the honored statesman spoken in centuries instead of years, it would have been equally true

Always bearing in mind, then, this weakness of human nature, let us learn of the downfall of lawmaking bodies.

#### THE DEBACLE HERE AND ABROAD

It is error to say that the decline of our State Legislatures began with the independence of the States. To be sure, there were no State Legislatures before independence, but presumably those who set such a starting point mean to imply that the colonial assemblies were the Heaven from which the legislative Lucifer has fallen. It would, however, not seem that the people of Virginia so viewed their Assembly a hundred years before the States were born. We are told that long sessions and frequent meetings increased the expenses of the counties for the salaries of the Burgesses, some of whom drew their stipend without attending, and charged up against their constituents the cost of the liquors they drank. "Little wonder that the people became rebellious, government was in the hands of a ring, the assembly was elected by the wealthier classes, councillors were exempted from taxation, salaries were excessive, sessions long, meetings frequent, and the abuse of office a daily practice" <sup>1</sup>

The mother of Parliaments, that which sat at Westminster, was no more virtuous than her children. Samuel Pepys told his "cozen," according to the entry of May 27, 1663, in the famous Diary, that it was "a matter of the greatest grief to him in the world, that he should be put upon this trust of being a parliament man, because he says nothing is done, that he can see, out of any truth and sincerity, but mere envy and design."

If in our search for the top of the hill down which we are sliding, we should go back to the good old days of the Roman Senate under the Antonines, or the Athenian assemblies under the Tyrants, we might still doubt if we had found perfection. Very likely, too, the citations would arouse the same feelings that filled the breast of plain Benjamin Randall of Sharon when in the Massachusetts Convention for ratifying the Federal Constitution there had been much reference to the Amphictyonic League, to Athens, Sparta, and Rome, to ancient Jews and ancient Britons, whereupon Randall exclaimed. "The quoting of ancient history is no more to the purpose than to tell how our

<sup>1</sup> C. McL. Andrews, *Colonial Self-government*, 210

fathers dug clams at Plymouth " So turning our backs on history really ancient, let us see if we can find in some American State Legislature the pinnacle of excellence from which we have fallen. For example, Illinois Governor Thomas Ford ought to be good authority on that. He attended the first State Legislature, in 1818-19, and was present at every session from 1825 to 1849. Here is what he saw: "The frequent legislative elections, the running to and fro of the various cliques and factions, before each election; the anxiety of members for popularity at home, the settlement of plans to control future elections, to sustain the party in power, on the one side, and to overthrow it, on the part of the minority, absorb nearly the whole attention of the Legislature, and leave but little disposition or time to be devoted to legitimate legislation. So much is this the case, that the most important measures, such as may have the greatest influence on the well-being of the present and all future generations, pass through the two Houses, or are rejected, almost without debate, and frequently without notice " <sup>1</sup>

This was criticism so mild and gentle compared with what we now enjoy, as to warrant the presumption that either our grandfathers had not learned how to abuse, or else that there was really small basis for slander in the first half of the nineteenth century. Early in the second half, critics were getting more caustic. Frank B. Sanborn recalled that Thoreau lived in Concord near the railroad station where Governor Banks and his friend might alight, coming to the great muster. As the philosopher was going down to the post office, he met a neighbor who asked "Harry, where are you going?" "I heard that the Governor of Massachusetts is coming to Concord today, and I am after a lock to put on our front door." "Yes, but the General Court is coming up, too." "Oh, then, I must put a lock on our back door " <sup>2</sup>

After the Civil War we really found out how vastly better had been the preceding era. Then it was, May 20, 1875, that "The Nation" despairingly asked: "Are these decaying bodies to die out and disappear, and leave but a wreck of popular institutions behind them? Are we doomed in our generation to see the old vicious circle of politics renew itself — freedom resolving itself into anarchy, and anarchy in turn bringing in force? It must certainly be admitted that the public odium into which the Legislature has year by year brought itself has become so

<sup>1</sup> *History of Illinois*, 288

<sup>2</sup> *Reminiscences of Seventy Years*, 44

great, that if the power of dissolving a legislative assembly had been retained by our system in the hands of the executive, there can be little doubt that it would have been exercised several times within the last few years, or, if not actually exercised, would have been held *in terrorem* over the heads of the members, to the great comfort of a majority of the inhabitants of the State "

Yet we had by no means reached the bottom of the gulf. We were still falling when the first number of the "Political Science Quarterly" appeared, in March of 1886. Therein Professor John W. Burgess showed that we had begun to realize our plight and were trying to save ourselves. After reviewing constitutional changes in the matter of the legislative department, he said: "It cannot be doubted that we have in all this a great decline in the dignity, influence, and power of the Commonwealth Legislatures, and therefore of the Commonwealths themselves. It is unmistakable that a stronger consciousness of nationality, a larger confidence in the national government, and a pronounced distrust of the Commonwealth governments have taken possession of the whole people, and are now realizing themselves in the constitutional and legal transformation of our entire political system "

Eight years later Moorfield Storey, delivering the presidential address to the American Bar Association, August 22, 1894, declared: "In Massachusetts, during each successive session for years, I have heard on every hand, 'This is the worst Legislature we have ever had ' " They still say that in Massachusetts.

Storey summarized: "Whether we look at the Constitutions which the people adopt, or listen to the common speech of men, we find that the faith in the representatives of the people on which our government was founded is gradually weakening. Of our historical representatives we are justly proud. On our possible representatives we still rely, but our actual representatives we fear and distrust." A critic of the same temper, E. L. Godkin, writing three years later, not only recognized the change for the worse, but suggested the reason. "From the hands of the wealthy, the power as a rule, has passed or is passing into the hands of men to whom the salary of a legislator is an object of some consequence, and who are more careful to keep in touch with their constituents than to afford examples of scientific government, even if they were capable

of it.”<sup>1</sup> More savage was the attack by S. P. Orth in 1904. “We have grown”—notice that he says “grown”—“to distrust our State Legislatures. Their convening is not hailed with joy, and a universal sigh of relief follows their adjournment. The utterances of the press, the opinions of publicists and scholars, and the sentiments of the street and the marketplace are quite at one in their denunciation of the Legislature. Our representatives are the subject of jest and ridicule, of anger and fear. This is a serious matter. When a democracy loses faith in its lawmakers, respect for law must soon fade away, and with it banishes self-government.”<sup>2</sup> Then, among many whose words for the most part carried less weight, came F. J. Stimson, averring that “most significant of all political matters is the growing distrust of Legislatures”;<sup>3</sup> Charles A. Beard to singularly like effect, saying that “in the United States nothing has been more remarkable than the decline of representative assemblies in popular esteem”;<sup>4</sup> Roger Foster, who, speaking of Congress, says he “is unable to observe that the Senate has fallen in public respect as much as the House and the State Legislatures since” 1870,<sup>5</sup> and Governor Emmet O’Neal of Alabama, who thinks “candor compels the impartial observer to admit that the efficiency and character of State Legislatures has been lowered and that general distrust has succeeded what at one time was universal and unreserved confidence.”<sup>6</sup>

No refutation of all this is to be looked for in the fact that the same sort of thing has been said over all the world, but therein at any rate lies proof that Americans are not alone in the decadence of self-government, if such it be. So let our humiliation be mollified, if we cannot be cheered, by reading some of the judgments passed elsewhere in the same strain.

In England those who despair seem to agree that the debacle dates from the Reform Bill of 1832. In the very next year Coleridge wrote. “You see how this House of Commons has begun to verify all the ill prophecies that were made of it—low, vulgar, meddling with everything, assuming universal

<sup>1</sup> “The Decline of Legislatures,” *Atlantic Monthly*, July, 1897.

<sup>2</sup> “Our State Legislatures,” *Atlantic Monthly*, Dec, 1904.

<sup>3</sup> *Popular Lawmaking*, 290.

<sup>4</sup> *Cyclopedia of Govt*, III, 185.

<sup>5</sup> *Commentaries on the Const. of the U S*, I, 496 note.

<sup>6</sup> “Distrust of State Legislatures,” *No Am Rev*, May, 1914.

competency, flattering every base passion, and sneering at everything noble, refined, and truly national." Commenting on this, Lilly said: "From that time until now, the character and tone of the House have sunk lower and lower, until it has offered us the spectacle of honorable members belaboring one another on the floor, while spectators in the gallery, not unnaturally, hissed and cried 'Shame' It is the true function of the House of Lords to supply the deficiencies of this degraded and decadent assembly, and to remedy its blunders"<sup>1</sup> By 1882 things had reached such a pitch that a writer in "Blackwood's" thought that "the House of Commons seems to have outlived its usefulness" More moderate, and perhaps all the more significant, was the admission of Sir Arthur Balfour, if he was rightly quoted in "The Nation" of May 8, 1913, as having recently said: "Democracy seems incapable in many cases of creating an assembly representing itself to which it can pay the tribute of respect" In the thirty-nine years since he entered the House of Commons, some of the many changes, he thought, had impaired its prestige He would not concede any distinct deterioration in the membership "But I have to admit," he continued, "that I think we stand less well in the opinion of the country" In the following year Lord Robert Cecil, addressing the Select Committee on House of Commons Procedure, spoke of the general tendency of audiences at public meetings "to regard the House of Commons as somehow more or less played out" That seemed to him putting the matter in a very exaggerated form, but he thought he would say that various causes he mentioned had produced "a certain want of prestige in the House of Commons." Somewhat more positive was William Clarke when writing on Bismarck in Number 397 of the "Contemporary Review" (January, 1899), for he found in England "a visible decline in the esteem in which Parliament is held, and of the genuine authority which it possesses" No such restraint appears in Clarke's verdict on the Continental situation "There is no more patent and significant fact in contemporary Europe," he declared, "than the failure, if not the absolute collapse, of parliamentary government." Josef Redlich, in the opening pages of his work on "The Procedure of the House of Commons" (1908) referred to "the widespread increase of mistrust in parliamentary government," and about

<sup>1</sup> *First Principles in Politics*, 241

the same time a capable American observer, Ernest Bruncken, declared that in the countries like France and Italy parliamentary government was daily falling into greater disrepute.<sup>1</sup>

A great part of W E H Lecky's caustic book on "Democracy and Liberty" was devoted to describing "the declining respect for parliamentary government." Telling his purpose in the introduction to the second edition, he said: "I have pointed out the tendency of modern democratic Parliaments to break up more and more into small groups with the inevitable consequence of enfeebling the executive; destroying or dislocating the party system; giving a disproportionate power to extreme, self-seeking, and skilfully organized minorities, turning important branches of legislation into something little better than a competition of class bribery, and thus lowering the tone of public life and the character and influence of public men." A less partial and prejudiced observer, A V Dicey, was in 1899 confident that "faith in Parliaments has undergone an eclipse," and that "in proportion as the area of representative government has extended, so the moral authority and prestige of representative government has diminished."<sup>2</sup> He thought that this must be patent to any man old enough to remember the condition of opinion as late even as the middle of the nineteenth century. "When the revolutions of 1848 gave to reformers or revolutionists an unexpected though transient opportunity for putting their theories into action, there was not a friend of progress or freedom throughout Europe who did not believe that the extension of representative institutions of one kind or another throughout the civilized world would confer the greatest benefit on mankind. Compare now this universal faith which marked the middle with the scepticism which marked the close of the nineteenth century. From every part of the world is heard criticism or censure of representative institutions."

Reversals of opinion after the World War were instructive. It was believed the world had been made safe for democracy. Thrones toppled. Soon but two or three monarchs remained and their powers were limited. Constitutions grew like mushrooms. A dozen years later most of the new democracies had become autocracies. Why?

Dogmatic answer to that question is rash while the turmoil of

<sup>1</sup> "Defective Methods of Legislation," *Am Pol Sc Qy*, May, 1909

<sup>2</sup> *Harvard Law Review*, June, 1899



revolution lasts Time is necessary for the right perspectives. Meanwhile some of the factors may be tentatively suggested. In some cases possibly first in importance should be placed lack of training in self-government None of these countries had behind them the century and a half of development of parliamentary institutions that was the fortune of our own country. In some of them the new legislators were wholly without experience in the making of laws Furthermore, the revolutions threw into power visionaries, radicals, and self-seekers. Their dreams and their ambitions met opportunity in the multi-party system made familiar in France and such other countries as had not followed Anglo-Saxon models. So the new republics became the battleground of factions. In the smaller countries Parliaments were found too costly, not only of themselves, but also because of the topheavy bureaucracies they created. Expense was the greater because of graft and corruption, which not only added to the burdens of peoples impoverished by war, but also destroyed confidence and respect Believing they had jumped out of the frying pan into the fire, they jumped back again

#### REASONS FOR BELIEF

Against the widespread belief that there has been deterioration in the lawmaking bodies of English-speaking peoples it is doubtless impossible to make headway, however strong the conviction that the belief is in large part unwarranted The most that can be hoped is to temper hostility somewhat by a better understanding of the facts. Perhaps a fairer judgment can be secured by leaving in abeyance the question of whether there actually has been deterioration and by granting what is indeed indisputable, that the public at large firmly believes it to have taken place Shifting the argument, then, to the causes for belief, what changes inducing it have taken place?

First may be named discontent with results Democracy has disappointed. It has not brought the millennium Millions of men have failed to get from it that bettering of their own condition which they so confidently hoped Faith has given place to doubt. Herein lies explanation that appeals to President Lowell observing the United States, to H G Wells observing Great Britain. Lowell thinks the political millennium is farther off than when enthusiasts began to build the road to it and saw its splendors in the sky. Disillusionment has shed a cold gray light

over the landscape, while men, heedless as usual of the inexorable laws of nature, are seeking for a scapegoat. Representative assemblies have not proved senates of unfailing wisdom, guided only by desire for the public good, and from many quarters we hear laments over their deficiencies. Public confidence in them has manifestly declined, and with increasing rapidity of late, until it almost seems that the American people are drifting toward a general loss of faith in representative government.<sup>1</sup> Wells thinks that the new situation which confronts the Liberal intelligence of England is the discontent of the enfranchised, the contempt and hostility of the voters for their elected delegates and governments. This discontent, this resentment, this contempt even, and hostility to duly elected representatives is no mere accident of this democratic country or that, it is an almost world-wide movement. It is an almost universal disappointment with so-called popular government, and in many communities — in Great Britain particularly — it is manifesting itself by unprecedented lawlessness in political matters, and in a strange and ominous contempt for the law.<sup>2</sup>

What Wells speaks of as contempt for law I should rather construe as disrespect for authority. Apart from those who dispense the criminal law, our public officials and representatives no longer command the deference that was the rule in former times. Modern conditions have driven dignity out of legislative halls. The maxim that familiarity breeds contempt had its origin in no mistaken conception of human nature. The jests of the people betray their sentiments and though lampoons have for ages been the lot of public men, their greater prevalence in our day marks the growth of democratic disparagement.

Democracy also brings in its train an ever-widening resentment against leadership as well as against control of any sort. Even success arouses its jealousy. Those whom the citizen once looked upon as his masters he now views as his servants, to be abused and derided and scorned as may suit his whim. A public servant is now expected to be a servant of the public, with all that the very word servant in its unpleasant signification implies.

The volume of individual discontent has been vastly increased in the last seventy-five years by the spread of what we commonly call education, for want of a better word to describe the

<sup>1</sup> *Public Opinion*, 130

<sup>2</sup> *Social Forces in England and America*, 294 (1914)

capacity to acquire information of a sort and to learn of miscellaneous opinion. The public school has very greatly enlarged the number of those who habitually read and the newspaper press has grasped the opportunity, furnishing the masses with that for which they find the masses are willing to pay. In this respect the judgment of the publishers has itself greatly changed. Fifty years ago it was possible to find in many journals a reasonably thorough, dignified, and instructive report of legislative proceedings, adequately informing the public of what took place, with an attention to proportion meant to satisfy an intelligent reader interested in public affairs. To-day such a report is almost unknown. With but very few exceptions, the larger papers will not give it space. They will print only the spectacular matter or that which pertains to topics presumed to have exceptional popular interest. Having learned that more money is to be made by entertainment than by instruction, publishers of course follow the more attractive path. The result is that the amusing, the undignified, the foolish doings of lawmakers are "played up," as newspaper parlance has it.

For illustration, take the absurd bills sure to be introduced. The newspaper story never explains that the theory of representative institutions contemplates an opportunity for every citizen to present his grievance and suggest a remedy. There are silly citizens. When one comes to his Representative with his pet notion, shall it be refused a hearing? You may say that a Representative ought to decline to present such measures. He usually does, but now and then an honest and not altogether illogical belief that every petitioner ought to be heard, leads to the introduction of a bill with which the member introducing has not the slightest sympathy. Occasionally, too, a constituency will elect for its Representative a man with unbalanced mind, who will introduce a preposterous bill of his own. Nearly all the foolish propositions, however, come from outside. Surely it is not fair to judge a lawmaking body by such things, and yet their exploitation by the press contributes not a little to the poor opinion in which all legislators are held.

It is the exceptional lawmaker, too, who furnishes grist for the humorist. Of course there are men in Congress and the Legislatures who have peculiarities of speech or conduct, just as would be found among an equal number of jurists, physicians, architects, merchants; but there are very few who do not ob-

serve all the usual conventions. There is absolutely no warrant for making the typical Congressman the butt of ridicule. Yet if you will watch the pages of the humorous periodicals, or those of the "funny" sections of the Sunday papers, you will find constant flings at the expense of the nation's lawmakers. The persistence of this sort of thing in the press, day in and day out, year after year, helps shape the public appraisal.

The situation is well illustrated by the press galleries in Washington. Nine tenths of the episodes that the newspaper correspondents adjudge to have what is called "human interest," take place in the Senate. The necessarily rigid rules of the House minimize the running debate that develops fireworks. Furthermore it is presumed and very likely is the case that the public is more interested in the personalities of Senators than of Representatives. The result is that the newspaper men pass most of their time in the Senate end of the Capitol. Often but two or three of them will be seen in the House press gallery. Rarely is House debate sent over the wires. Fortunate is the Representative who reaches his constituents with more than two or three sentences of what may have been a carefully prepared speech, powerful in argument, forceful in delivery, informative and persuasive. Senators do not fare much better in point of serious discussion, but rarely fail of publicity when vituperative or ridiculous.

Another change in the nature of the press has had an effect little realized. A century ago partisanship was the life-blood of the newspapers. Nearly all of them were party organs. Their first duty was to commend the principles and practices of the party championed, to condemn those of the other party, to praise leaders and criticize opponents. This kept alive throughout the year an interest in policies and personages. Editorial columns were read for the sake of the emotions aroused by attack and defense. News columns regularly furnished political pabulum for hot debates in the country store. Half a century ago publishers began to find out there was more profit in reaching the whole community than in reaching only part of it. Advertising became the dominant consideration. Advertisers cared nothing for politics but wanted readers. Slowly the intensely partisan papers changed their tactics or disappeared. "Offend nobody" became the motto. Editorial opinion ceased in large measure to shape public opinion. Some journals still argue,

praise, and blame, but the great part now prosper by informing and entertaining with news and miscellany

Of those that advise the public, the most far-reaching in their influence are the newspapers that cater to the multitude and find gain in appeal to class and group prejudice. Often this does not correspond with political prejudice, but it does gravely affect legislators and lawmaking. The editor-demagogue who can excite from a hundred thousand to a million voters by distortions that array the thriftless against the thrifty, that arouse covetousness, that malign honorable servants of the public, that decry independence in thought and action, has become a factor in our public affairs not to be overlooked when seeking for the causes that have of late lessened esteem for representative government.

Another influence of the press shows itself in the matter of what may be called transient public opinion, as I have pointed out elsewhere.<sup>1</sup> Nowadays those journals seeking or having the larger circulations, counting or hoping to count their readers by hundreds of thousands, find it profitable to play on passion or prejudice by championing this or that social, economic, or political fad of the moment. The thoughtless men and women who act from impulse, and promptly reach emphatic conclusions after reading but one side of a question, demand that a new law be enacted straight off. Congress or Legislature, slow and cautious, fails to respond and is forthwith condemned by the impatient multitude. A few months later the fad may be forgotten, but the mental impression of indifference and lethargy remains.

Precisely the same change appears in the comparatively new attitude of the English press toward its lawmakers, save that there the influence and standing of the House of Commons suffer more than in the case of the upper branch. A. G. Gardiner, veteran English journalist, writing in the "Atlantic" of August, 1921, about "The Twilight of Parliament," laid part of the responsibility at the door of what he called "the new journalistic hierarchy," the few great syndicates that have made the appeal to reason more difficult, and the appeal to violent emotion infinitely more profitable. This led the public on stunts and sensations, Gardiner says. It debased the currency of political controversy to phrases that could be put in a headline and passed from mouth to mouth. The old-fashioned newspaper, which re-

<sup>1</sup> Robert Luce, *Congress An Explanation*, 129

ported speeches and believed in the sanctity of its news-columns, went under or had to join the *saute qui peut*. Parliament was treated as a music-hall turn. If it was funny, it was reported, if it was serious it was ignored. With the exception of a few papers, chiefly in the provinces, the utterances of serious statesmen other than the prime minister were unreported.

There is little of the entertaining about the normal work of making laws. As Henry Cabot Lodge observed, legislative bodies have rarely touched the popular imagination or appeared in a dramatic or picturesque attitude. "The Conscript Fathers, facing in silence the oncoming barbarians of Gaul; Charles the First attempting to arrest the five members; the Continental Congress adopting the Declaration of Independence, the famous Oath of the Tennis Court — are almost the only instances which readily occur to one's mind of representative and legislative bodies upon whom for a brief instant has rested the halo of heroism and from which comes a strong appeal to the imagination. The men who fight by land and sea rouse immediate popular enthusiasm, but a body of men engaged in legislation does not and can not offer the fascination or the attraction which are inseparable from the individual man who stands forth alone from the crowd in any great work of life, whether of war or peace."<sup>1</sup> The recognition and practical application of this by the press of to-day accounts in no small part for the ignorance and the indifference of the public at large in relation to the actual doings of their Representatives in legislative halls.

Group action is another development that in our time has contributed in this respect. Frederick M. Davenport, long an intelligent and capable observer and analyst of matters political, concluded after recent service in Congress that one of the two outstanding causes for the present weakness of that body is the influence of pressure groups that are no longer secret lobbies of the old order, but open organizations of men and women out to punish any Representative who opposes the particular special interest of their own enthusiasm and desire.<sup>2</sup> Calvin Coolidge, in one of his writings after he had left the White House, said "it is because in their hours of timidity the Congress becomes sub-

<sup>1</sup> Address at Princeton University, March 8, 1912, printed as Senate Doc. 406, 62nd Congress, 2nd Session.

<sup>2</sup> "The Magnitude of the Task of the Politician," *Harvard Business Review*, July, 1933.

servient to the importunities of organized minorities that the President comes more and more to stand as the champion of the rights of the whole country"<sup>1</sup> Mr Coolidge went on to observe that organizing such minorities has come to be a well-recognized industry in Washington. They are oftentimes led by persons of great ability, who display much skill in bringing their influences to bear on the Congress. They have ways of securing newspaper publicity, deluging Senators and Representatives with petitions, and overwhelming them with imprecations that are oftentimes decisive in securing the passage of bills.

The other of what Mr. Davenport thinks the two outstanding causes for the present weakness of Congressional government is the presence of widely heterogeneous elements in the population itself, as well as diverse sectional backgrounds and interests. This factor I should not rank quite so high. From the start ours has been a nation of heterogeneous elements, but though the percentage of descendants from colonial stock may not be so large as in the years immediately following the Revolution, it is still decidedly preponderant. Four fifths of the names of Senators and Representatives now in Congress indicate Anglo-Saxon origin and others that are Nordic are borne by men whose forebears have been here for generations and who are completely American. To be sure, about a quarter of the Representative districts contain racial groups voting with numbers and solidarity that make their prepossessions and prejudices politically of much consequence, but the effect in the work of Congress itself is rarely conspicuous.

Conflict of sectional backgrounds and interests is more important, and gravely so. It is not novel. The nation began with fear, rivalry, struggle between the northern and southern States. Economic interests played the largest part in bringing on the Civil War. To-day the strife is between the regions where industry predominates and those that are mainly agricultural, with lesser groupings as in the case of the mining States and criss-crossings that spring from special interests such as foreign commerce. Hence come the "blocs" that from time to time disturb the normal processes of legislation under the two-party system. So far these combinations have not lived long enough to warrant the apprehension they have aroused. We are not yet seriously threatened by the multi-party methods of Continental

<sup>1</sup> *American Magazine*, August, 1929

Europe. However, while a "bloc" lasts, it does make trouble, and at all times the timid stand in fear of special interests.

Next we must reckon with the effect of the material and social changes of the last two generations. The growth of wealth has affected the standing of legislative bodies by exposing them to more powerful influences of a selfish nature than the world had seen since the days of the decadent Roman Senate. The corporate form of commercial activity lends itself peculiarly to methods that eliminate the restraining power of individual conscience and encourage pressure of the soulless variety. Also, through the money at command, it has made possible an unprecedented development of the art of propaganda, by which an artificial opinion may be created for the purpose of accomplishing selfish ends. This not only tends to muddle opinion itself, but also tends to vitiate the processes we have devised for putting opinion into action.

The progress of science by leaps and bounds has brought to lawmaking bodies a great variety of problems calling for technical knowledge that cannot be adequately supplied by Representatives chosen for the most part with no regard to special training. An eminent lawyer, who for some years was at the head of one of the largest public-service corporations in the world, and whose knowledge of business and social problems far surpassed that of most legislators, told me that one winter, having less on his hands than usual, he had systematically examined the bills introduced into the Legislature of his State and found that in many instances he was unable to determine to his own satisfaction what should be the decision. His conclusion was that we have outgrown the lawmaking methods adequate in simpler times.

The attractions of public life are not such as to draw into it any considerable number of experts or of exceptional men of affairs. The prospect of the drudgery inseparable from a Congressman's life, does not allure. The likelihood of being for several years a nonentity in the House itself is not offset by the knowledge that every member can be busy and of use behind the closed doors of a committee room, it is but human to crave some repute for good work done. The almost complete absence of opportunity to share in handling the big problems other than those of one important committee or two or three minor committees lessens attractiveness. The probability of a tiresome



campaign for re-election every two years, with the complete uncertainty as to whether Fortune will permit the long service that alone can bring prestige, honor, satisfaction, adds to the doubt as to whether the game is worth the candle.

Another reason why our lawmaking bodies fail to meet the present-day demand is that they are in the control of men who by education and occupation are hostile to the spirit of this demand. Lawyers still preponderate, men by their profession inclined to destructive criticism, worshiping precedent, accustomed to interpret laws but not to make them. Nowadays the public, or at least the vocal part of the public, calls for constructive, not obstructive nor destructive legislation. Furthermore, it wants the laws brought up to the minute. In our time conditions change so rapidly, science moves so fast, inventions tread so closely on each other's heels, that elderly legislators, those who usually control, cannot keep up. Most men carry through life the ideas and theories they acquired in youth. It is particularly hard for a Congressman to acquire new bases for judgment, new principles for guidance. The routine of his work leaves little time for miscellaneous reading. Even the technical literature relating to his immediate problems must often be skimmed, not thoroughly studied and fully digested.

Walter Lippmann wrote his suggestive book on "Public Opinion" to establish the proposition that the great need is to inform all who directly or indirectly have any share in lawmaking. Says he (p. 288): "The main reason for the discredit, which is world wide, is, I think, to be found in the fact that a congress of representatives is essentially a group of blind men in a vast, unknown world." In our case he lays the blame at the door of our choosing representatives by districts and contests the theory that with the best man of each district bringing the best wisdom of his constituents to a central place, all these wisdoms combined are all the wisdom that Congress needs. He holds that a combination of local impressions is not a wide enough base for national policy, and no base at all for the control of foreign policy. However, even granting that Mr. Lippmann is right, that does not concern a great part of the work of Congress, what may be called its business.

The expansion of the legislative field to take in a great variety of administrative laws has strained to the breaking point a law-making system adapted to handling measures comparatively

few in number, with principles and policies predominating. The system is not suited to handling administrative detail properly. The more that such detail is imposed upon it, the worse the results.

In the American States constitutional change has been steadily in the direction of making the machinery of lawmaking less responsive and less effective. Restraint and then more restraint has been the universal story. Every shackle has made things worse. Every interference has encouraged evasion, which always impairs morale. Every lessening of responsibility has increased irresponsibility. Every lowering of the honor of office has made office less inviting to men of ambition and a fine sense of duty. The corrupt are less and less hampered by the rivalry of the honest. The incompetent find it more and more easy to win election and the attractive salary that follows.

In another way salaries, ever growing, have wrought evil. Of old it was not expected that the salary of a legislator would furnish him a livelihood. For most Congressmen it is now quite adequate to that end, and in some of the larger States it is large enough to attract men of modest habits and needs. It does not necessarily follow that these men are of themselves less useful legislators, but it does too often follow that the wish to retain office plays a part in shaping their course. The dread prospect of defeat looms. With every passing session they see lessen the possibility of successfully resuming the practice of a profession or rebuilding a business. They become cautious and timid, lose independence. Their best chance for income upon retirement being appointive office, they avoid offending the Administration or party leaders. Since constructive effort always disturbs somebody, they obey the maxim, "Let sleeping dogs lie." So their usefulness wanes.

The criticism that has been bred by these conditions has too often been of a nature to make the conditions worse instead of better, and so has by itself produced cause for more criticism. Who can imagine that the diatribes of the muck-raking epoch encouraged the clean young men of America to enter public life? Surely it was not made more attractive by the publication in important newspapers of such things as this "It is not possible to speak in measured terms of the thing that goes by the name of Legislature in this State. It has of late years been the vilest deliberative body in the world. The assemblage has become one

of bandits instead of lawmakers. Everything within its grasp has been for sale. The commissions to high office are the outward and visible signs of felony rather than of careful and wise selection."<sup>1</sup>

At the same time that the newspapers have been poisoning the masses, writers from whom we ordinarily expect words better weighed and conclusions reached with more careful study of the facts, the authors of essays and books, have been rashly prejudicing the youthful minds that in their turn are to shape opinion, as well as the minds of that part of the reading public at large which selects serious literature for instruction. One of these authors, Professor James H. Hyslop of Columbia University, published in 1899 "Democracy — a Study of Government," from a viewpoint as pessimistic as that of Lecky. We find him in his introduction averring that "the social and moral forces which democracy lets loose show no conservative respect for justice, law, and order." After cataloguing the evils of the times he goes on with reference to "the decline of legislative morality." Later he declares that "Congress has duties which it is impossible for the ordinary man to perform, however conscientious he may be", that "members are too frequently elected by a corrupt machine and an ignorant proletariat", and that "such power as is possessed is usually employed to satisfy either party or personal interests."

No more encouraging to public service are such words as those of a man commanding the attention naturally given to one who has been Attorney-General of the United States, Charles J. Bonaparte: "Our statutes are in great part the work of mere vote-hunters and demagogues, enacted for the temporary ends of politicians or artfully contrived to advance the selfish purposes of unscrupulous men, often the very men against whose wrong-doing they pretend to provide safeguards."<sup>2</sup>

For another illustration observe how Vernice Earle Danner disported himself on the heights of hyperbole. "For several generations the legislative system of our States has been the acme of inefficiency. It has been the promoter of graft, the harbinger of corruption, the creator of legal blunders, the mother of high taxes, and a barrier to every effort toward progress."<sup>3</sup>

<sup>1</sup> Quoted by J. R. Commons, *Proportional Representation*, 1.

<sup>2</sup> "Judges as Law Makers," *Green Bag*, Oct., 1911.

<sup>3</sup> *Forum*, March, 1914.

Even so judicious a critic as Governor O'Neal permitted himself to generalize extravagantly, saying that the distrust of Legislatures had in many States grown into open contempt for our lawmaking bodies "In many, if not a majority, of the States, a session of the Legislature is looked upon as something in the nature of an unavoidable public calamity Business becomes alarmed, industrial development and investment are checked, and there is a general apprehension that the results of the legislative session, instead of being beneficial, will be injurious to the public interests"<sup>1</sup>

To like effect is what is said by Professor M. H. Merrill of the University of Oklahoma about the public opinion of his State in this matter, which though perhaps more extreme than would be found in some of the other commonwealths, is typical of too many "Conversations with men and women representing every class in the State," he reported, "reveal a general feeling that for the most part legislators are not all that they should be, that the Legislature itself is a detriment to the State, albeit an unavoidable one, that the legislative sessions are to be anticipated with foreboding, endured with patience and long-suffering, and remembered with relief at their close"<sup>2</sup>

If that is the case, it must be by reason of sins of commission, but Professor Merrill also stresses sins of omission The Legislature, he says, has failed to face the vital problems of the State and to attempt their solution Legislation relating to subjects that have been topics of public discussion, that seriously affect the economic or moral welfare of the State, is either not attempted at all, is lost in the maze of legislative procedure, or passes one House only to fail in the other Bills for increasing the salary of county treasurers, for establishing a session of the county court at some ambitious town, or for making some minor change in the existing statutes have a good chance to become the law of the land Remedial or constructive legislation of real importance, however, is very unlikely to receive serious consideration, still less likely to be considered favorably.

Much the same criticism may be made of Congress. A few big bills and many little bills are enacted at each session, but

<sup>1</sup> Emmet O'Neal, "Distrust of State Legislatures," *No Am Review*, May, 1914

<sup>2</sup> "The Oklahoma Legislature," *Southwestern Pol Science Quarterly*, September, 1922.

the mid-way bills are for the most part postponed and postponed. This is particularly true of measures relating to the machinery of administration. Its wheels are allowed to creak year after year for lack of adjustments. That explains in part, for example, why Congress has been so slow in meeting the crying demand for improvement in judicial processes.

There is less ground for the fault found with our national House of Representatives by Professor Harold J. Laski, who after teaching at Harvard became Professor of Political Science at the University of London and who is one of the most prolific writers on that subject. His animadversions in the matter of Congress well illustrate misunderstandings probably inevitable on the part of men who have not served in legislative bodies.

The House, he says, "commits every fault against which the canons of political science can utter warning"<sup>1</sup> That is at least comprehensive. Further, "the first business of a legislature is to illuminate great principles in debate, but the House has long since ceased so to discuss public questions that the electorate can be persuaded to follow their analysis." There is some ground for this, but although debates are rare and none match in length those of half a century and more ago, the big questions are debated enough to enlighten the public if it wished to be informed. The trouble is that the newspapers do not think such to be the case.

More debatable is Professor Laski's complaint that "the main work of the House is done in the dark recesses of committee-rooms whence only rumor and legend emerge for the edification of the press," this being inconsistent with his theory that "essential proceedings should be conducted in the public view." In another volume I have given the reasons to the contrary,<sup>2</sup> and here need only observe that very few judicious men who have been members of legislative bodies would say that executive sessions of committees are undesirable.

Professor Laski further says: "A legislature should be so organized that the opponents of government have a clear and full opportunity to make their case against its policy. But the deliberate purpose of the organization of the House is to reduce opposition to a speechless nullity." Such is not the purpose nor does the implied effect follow. On the contrary the

<sup>1</sup> "The American Political System," *Harper's Magazine*, June, 1928.

<sup>2</sup> *Legislative Procedure*, 149.

minority gets more than its fair share of opportunity for discussion. The time for debate is always divided evenly between those who favor and those who oppose. In the House of the 73rd Congress (1933-34) the majority party had about three quarters of the members. Yet the other quarter had half the time for debate. It is true that by reason of the phenomenal influence of the President and the evident need for quick action on measures meant to relieve suffering and hasten recovery from the depression, debate on some very serious and important proposals was limited, unduly the minority thought, but in normal times there is usually opportunity enough, and more debate than the greater part of the members will take the time to hear. The fact is that debate in the House extending over days is in disfavor, but this is not the fault of either procedure or leadership.

In England among the reasons given for the decline of the prestige of Parliament are: the influence and attitude of the press, the extensions of the suffrage, direct action by labor; the greater control that party organizations exercise over their members in the House, the increase of executive power, the complexity of legislation, the dudgey that repels from membership highly educated young men of independent means

Of the reasons why American lawmaking bodies do not satisfy I should place at the head their failure to adapt their processes to modern social and economic conditions, together with the failure to make constitutional changes that would permit such adaptations as cannot be otherwise made. Notwithstanding occasional outcry against individual measures and the unwarranted complaint as to the volume of the legislative total, my conviction is that the public believes there is failure to keep up with the needs developed by science and invention, with the resulting changes in producing and distributing processes as well as in social relations

This is the charge now making against parliamentary institutions everywhere. Thus Lord Ponsonby, writing in England, says: "Clearly our slow-working, ill-devised procedure for legislation, combined with the doctrine of gradualness, cannot cope with the problems of to-day which need rapid and drastic action. With all its anomalies, it may be argued it works and at any rate has prevented revolution. It may have worked, but it does not work and is not working to-day. The countries which

copied the representative parliamentary system are scrapping it." <sup>1</sup>

Failure to meet promptly the immediate needs was not the only reason for that scrapping, but it was unquestionably a potent factor.

It is a reason actively at work in the United States. Whether the republic will prove equal to meeting it, is a question of no small magnitude.

#### EFFECTS OF FAULT-FINDING

Whether or not on the whole the effects of fault-finding have been salutary, granting that the critics, stirring the people to a keener sense of their responsibility for their own government, and inculcating higher standards of conduct for public men, have done a useful service, though at the cost of great individual injustice and much undeserved humiliation, yet to them may fairly be attributed a large share of responsibility for the low esteem in which our lawmaking bodies have come to be held.

Theodore Roosevelt furnishes most striking illustration of this. Forty years ago he wrote for the *Century Magazine* a description of the New York Assembly — the only account of the actual workings of a State Legislature that has ever, so far as I can find, received wide-spread reading, one of the few accounts that have ever been printed in a periodical. This description of what was then one of the worst legislative bodies in the world, doubtless was accurate as Mr. Roosevelt saw it, and I have no wish to impugn his statements, yet everybody knows Mr. Roosevelt's temperament inclined him to a use of hyperbole that was on many occasions wonderfully helpful, but that did not increase the confidence of a cautious seeker for scientific precision. Anyhow the description he wrote appears to have been accepted by many writers at home and abroad as a fair description of a typical Legislature, with the result that all American Legislatures greatly suffered thereby in reputation.

Mr. Roosevelt's habit was to dogmatize. It is a habit natural to critics and not without merits, but sometimes it overshoots the mark. One thing Mr. Roosevelt said at that time, when he

<sup>1</sup> "Will Parliamentary Government Survive?" *Contemporary Review*, February, 1933

had served three terms in the New York Assembly, may suffice to show the danger of sweeping statement "No man," he declared, "can do good service in the Legislature so long as he is worrying over the effect of his actions upon his own future."<sup>1</sup> That may be a true enough generalization, but like all generalizations is subject to proviso by reason of complicating factors. If life could be reduced to ten axioms, like Geometry, it would be more simple. Not even on the Ten Commandments could be built an ethical structure wholly logical, without contradictions. Roosevelt's dictum runs counter to another, not less important, to the effect that every man must live his whole life. The idea that we should live as if there were no to-morrow goes against the whole current of society. It is every man's duty to preserve his own usefulness as far as he can without violating principle. Or it might be said rather that if he violates principle, he mars his usefulness, for his moral fibre suffers. These things can be reconciled. In essentials a legislator should have no thought of his own fortunes, and by essentials are meant those issues involving ethical considerations, those of right and wrong, as they present themselves to each individual, and they include public as well as personal ethics. Great party principles would come within the classification. But in minor matters of expediency, not ethical, not vital, it may be perfectly legitimate sometimes for a legislator to remember the circumstances of his constituency, though in no case should he worry.

Another half-truth, often used as a basis for criticism, is to the effect that a legislator should always be absolutely independent, should always form his own judgments. As a matter of theory the validity of the dictum may be doubted. A legislative body is not an aggregation of hostile units, each in arms against every other. Give-and-take, concession, compromise are of the essence, for the very object is to unite a majority on common ground. There lies the error of those who talk about the individual responsibility of legislators, as if it were of course to be desired. Walker D Hines, for example, writing on "Our Irresponsible State Governments,"<sup>2</sup> says with an air of regret and rebuke that it is ordinarily impossible to place the blame on any particular member for any important act which proves to be contrary to the public interest. "Generally he is able to

<sup>1</sup> "Phases of State Legislation," *Century Mag*, April, 1885

<sup>2</sup> *Atlantic Monthly*, May, 1915



share that blame equally with every other member of the majority which acted or failed to act." Why should he not? Is he who persuades less or more to be blamed than he who is persuaded? Have you not asked both of them to reconcile and harmonize their views, if they honorably can, to the end that there may be decision? Would you single out members of a jury for punishment if you did not like their verdict?

Whatever the theory, as a practical matter complete independence is impossible, for no man can acquaint himself with all the fact and argument bearing on every question on which he must vote. Men must in some measure rely on the judgment of others, must to some degree assume their honesty and wisdom. Too many members ruin their chances for influence by taking needless positions upon matters of which they have no personal knowledge. There is nothing dishonorable in a discriminating reliance. It is compelled by the conditions of legislative work.

In this matter of co-operation, Mr. Bryce, usually so accurate an observer or so judicious in weighing the information given to him, fell into a singular error, unless my personal observation and experience are wholly exceptional. He says that the general good-nature of Americans, and the tendency of members of their Legislatures to oblige one another by doing reciprocal good turns, dispose them to let any bill go through which does not injure the interests of a party or person. An American essayist, W. D. Parkinson, has fallen into the same error, for he says that "the presumption is in favor of the enactment of any bill presented with plausible support, unless it meets with serious remonstrance"<sup>1</sup>. Mr. Parkinson wants the presumption changed so that it shall be against every bill whose sponsors cannot show public necessity therefor. That has been precisely the attitude of every group of legislators with whom I ever worked or whom I ever watched at work. The burden of proof is always on the petitioner. Indeed the habit of hostility gets to be so inveterate that with some men it becomes an obsession and destroys their usefulness, for they cease to have open minds. That is one reason why Senates are so often reactionary — most of their members have had previous service in the lower branch, developing the negative instinct, and every year in the Senate increases the tendency to oppose. Judge Lowell, whose experience was with the lower House in Massachusetts, thought that

<sup>1</sup> "The Rain of Law," *Atlantic Monthly*, July, 1914

even a leader soon comes to consider his chief duty is to stop legislation that is positively bad rather than to secure that which is positively good <sup>1</sup>

Mr. Bryce partly escaped from his blunder by saying that the good-nature which he held responsible for reciprocal good turns counts for less in a committee, and that a committee has its own views and gives effect to them, but he erred in citing this as a reason for the distinction he drew between committee and House. He was right in saying that in the House there are few views, though much impatience, the House has no time to weigh the merits of a bill reported to it, members know no more of what passed in the committee than the report tells them. Also he is right in saying that if the measure is palpably opposed to their party tenets, the majority will reject it, if no party question arises they usually adopt the views of the committee. The error lies in the assumption that good-nature plays any part in the process. The wise man follows the committee unless he knows of some reason to the contrary, because the committee exists for the very purpose of advising.

In respect to this as to every other phase of the legislative process, is it not reasonable to ask the critic to remember that the prevailing practice has been worked out by the friction of many strong minds, bent on devising a system that after as much study and argument as conditions may permit, will reconcile diverse views and secure decision? It is not yet a perfect system. Many of its details might be bettered forthwith. Yet in its broad outline perhaps it is nearer the best attainable than a theorist would grant. George Bancroft, learned in the history of our land, held that the institutions of self-government, if often defective, are always appropriate, for they are the exact representations of the conditions of a people, and can be evil only because there are evils in society, exactly as a coat may suit an ill-shaped person <sup>2</sup>

The same principle applies to the products of the system. At any given time the laws of a democracy are in the mass surprisingly near what the people want. Undoubtedly they are not the wisest possible. Frederick Pollock truly says that a public judgment of happiness, expediency, well-being, or whatever

<sup>1</sup> Francis C Lowell, "Legislative Shortcomings," *Atlantic Monthly*, March, 1897

<sup>2</sup> *History of the U S*, I, 416

else we call it, is in the nature of human affairs a rough thing at best.<sup>1</sup> As Judge Story put it, the question never was and never can be, what is absolutely best, but what is relatively wise, just, and expedient.<sup>2</sup> It is told that long, long ago when Solon, most famous of lawmakers, was asked whether he had given the Athenians the best possible laws, he answered, "I have given them the best they could bear." Whether legend or not, this has an element of eternal truth. Rousseau amplified it. "As an architect, before erecting a large edifice, examines and tests the soil in order to see whether it can support the weight, so a wise lawgiver does not begin by drawing up laws that are good in themselves, but considers first whether the people for whom he designs them are fit to endure them."<sup>3</sup>

In a republic, where nominally the lawmaking is the work of representatives but really is the work of the people themselves, the same principle is inevitably applied, though with the difference that it is an unconscious process. Do not suppose that an American legislature ever legislates consciously to phrase any great principle. To-day it is as true as when Plato wrote, that "no man is ever a legislator, but fortune, and all kinds of accidents, happening in all kinds of ways, are our legislators." The multitudinous laws reflect no understanding of the forces at work, no comprehension of the goal. Yet none the less they portray with the fidelity of an impressionist the condition of society at the moment, reveal its ideals, disclose its hopes.

The defects of our legislatures are mechanical, not temperamental. Most of the members, most of the leaders, are above the level of their constituencies in zeal and industry, honor and integrity, altruism and patriotism. Because hampered by outgrown processes, they waste strength and time. They could and would do better work if precedent, custom, and the people permitted. Their fault is that they do not revolt, use what power is in their hands, and by reshaping their methods as much as they can, meet in larger degree the needs of to-day.

Men who persist in wasteful ways are thereby stopped from resenting criticism, for the blame that is just protects the blame that is unjust. Yet so much of it is so outrageously unjust that the lawmakers of the land may well wonder sometimes whether

<sup>1</sup> *History of the Science of Politics*, ch. VII

<sup>2</sup> Mass. Convention of 1820, *Journal*, 289.

<sup>3</sup> *Social Compact*, bk. 2, ch. VIII

the habit of slander ought not somehow to be checked. They may be forgiven for wishing they could go back to the good old days when in the first year of the colony of the Massachusetts Bay in New England, Thomas Foxe, a servant, was ordered to be whipped for uttering malicious and scandalous speeches, whereby he sought to traduce the General Court, as if it had taken some bribe in a certain instance.<sup>1</sup> Nowadays, of course, however deep freedom of speech may sink in the slough of license, we can give no serious thought to whipping or other criminal penalty if our institutions or our public servants are maligned, but wholly vain may not be an appeal to thoughtful men, loving their country, to be cautious and accurate when they censure the men and the methods relied upon for translating the will of the people into law.

#### STATE AND NATION

There remains to be considered what has been held to be one effect of the criticism of our State Legislatures — the acceleration of the centralizing process that is the most striking phenomenon of recent American politics, in other words the tendency to transfer power from the State Legislatures to Congress.

The founders of our nation meant that it should control foreign relations and that the States should continue to handle nearly all domestic affairs. Congress was to be limited, the Legislatures were to be more nearly free. It was deliberate design, not accident, that led to a scheme of government whereunder Congress may exercise no powers not expressly delegated to it, and the Legislatures may exercise any powers not expressly denied. Under the restraints of this system Congress has directly touched the life of the citizen very little. Until of late it hardly deserved to be called a lawmaking body, if by the word "law" we are to mean that which affects the rights and duties of men. Excluding administrative matters, those of income and outgo, revenue and appropriation, the business of government, for a century or so the work of Congress was trivial in quantity and comparatively unimportant in bearing. It is doubtful if one citizen in ten thousand has ever seen or ever will see a copy of the United States Statutes. It is doubtful if one lawyer in ten owns a copy or ever has had occasion to refer to a copy. Outside the field of patents, copyrights, trademarks, and the

<sup>1</sup> *Records*, I, 54.

postal service, and again excepting revenue and expenditure, no national enactment was known of until recently by the masses of the people. The comparatively few who paid an internal revenue tax for selling liquors and cigars, or who returned after foreign travel, or who engaged in commerce on the seas, or who bought public land — these and some others may have had occasion to know the wording of a Federal statute, and of course everybody came in contact with postal regulations, but on the whole it could fairly be said that the laws of the nation had little of direct relation to the lives of the people.

On the other hand under the original division of powers the States retained, with few exceptions, the whole field of law relating to property, both real and personal; that of contract; domestic trade and industry, the charter and control of corporations, presently to become of magnitude as business incorporation developed, the whole domain of the family, including what are known as the domestic relations, marriage and divorce, wills and descent of property; municipal law, covering all of local administration by towns, villages, cities, counties; the making and use of highways (aside from the post-road provision), the greater part of the courts, the definition and punishment of most crimes; the promotion of morality; provisions for education, art, pleasure, recreation, the field of labor, including relations between employer and employee, hours and conditions, the protection of women and children; and the rest of the boundless realm of the police power. In other words it was the State that in time of peace seemed to have the whole charge of a man's safety and to be alone concerned with securing to him comfort, happiness, justice. The chances were that he would pass all his life without once feeling the weight of Federal authority. Even when that authority took money from his pocket, he did not know it, because all Federal taxation was indirect. The Nation was a distant sovereign, to be remembered only when a Congressman or President was to be elected, or when men talked politics, for the problems handled at Washington have always somehow seemed to the people bigger than those near by. The State was a neighbor and friend, ever at hand, in field or factory, at the fireside, on the street, wherever men worked or went.

When De Tocqueville wrote of his visit to America (1835), he reported to his countrymen that the governments of the

States were in reality the authorities directing society in America. Half a century later Bryce explained to his English readers that he who would understand the changes in American Democracy would find far more instruction in a study of the State governments than of the Federal Constitution. About that time one of our scholars pointed out that all the important constitutional changes of the preceding sixty years in England, a dozen or so in number, with the possible exception of some minor provisions, would in this country have been made by the State Legislatures, or possibly State Conventions, and not by the national Legislature.<sup>1</sup>

With the breaking down of the theory of States' Rights by the Civil War began a change in the division of powers. There had been a change in the ratio even before the War, brought about little by little as restraints on the Legislatures were put into State Constitutions. The powers thus abandoned by the States did not, however, go to Congress, but disappeared. It was only after the War that powers began to be transferred from State to Nation. For a generation the change made no great headway, but by the opening of the twentieth century it was clear that the States were dwindling, the Nation swelling. When our entry into the Great War forced us to muster all our strength, centralization leaped ahead, but not long after the end of the conflict it had fallen back nearly to its previous position. The experience, however, had prepared the way for action in another conflict that, with the depression which began in 1929, culminated with the closing of the banks, March 3, 1933, and continued through weary months of great unemployment, hardship, and suffering. For relieving the needs of the impoverished the treasuries of all the States were depleted, some were exhausted. Here and there constitutional limitations on borrowing were not to be quickly changed. Furthermore, the nation could borrow at lower rates of interest than the States. Quickly spread the belief that relief was in large part if not wholly a national responsibility. The result was swift and vast expansion of Federal activities, mushroom growth of bureaucracy, enormous increase in Federal outlay.

The legislation from which this resulted made great inroads on the principle that the States should administer their own affairs. Let two illustrations suffice. When a generation ago

<sup>1</sup> J. F. Jameson, *Int. to the Const. and Pol. Hist. of the U.S.*, 8.

the need of workmen's compensation insurance was to be met by legislation, nobody thought of turning to Congress save in the matter of interstate employment such as that on the railroads. Yet when in the course of the depression that continues at this writing, demand for unemployment insurance became insistent, hardly a voice was heard protesting that this was a matter the State Legislatures should handle. So also it was with old age pensions. Some of the States had already made a start in this field. By trial and error they were usefully working out the difficult problem. Clamor for national contribution drowned the weak voices of those who remembered what progress we have made by treating such things as local obligations. Ignoring the fact that needs vary greatly by reason of climatic conditions, regional characteristics of the population, and domestic habits, the national contribution was to be impartial. Worse still, responsibility was to be divided, insofar as Congress should concern itself with how its appropriations were spent.

In various other fields reformers took advantage of the opportunity to transfer their activities from the State capitols to Washington. There Congress turned decision over to the Executive, first by granting unhesitatingly his requests for sweeping powers, and then by enacting such legislation as was necessary for carrying out his proposals. Their wisdom is not here to be questioned. Our concern is with the effect on our system of government.

When Bryce wrote, in 1888, he thought the State, which set out as an isolated and self-sufficing commonwealth, had become merely a part of a far grander whole, which seemed to be slowly absorbing its functions and stunting its growth, as the great tree stunts the shrubs over which its spreading boughs have begun to cast their shade. To-day far more warrant for the simile could be found, though even when applied to present conditions, I should see in it something of poetic license. The States are weaker, but they are still powerful and will long so remain.

Reinsch in 1913 deplored the indiscriminate decrying of State Legislatures, as unfortunate and dangerous, because instead of arousing in the citizens the purpose of strengthening and purifying the local institutions of government, and thus allowing that condition of national life to continue in which political experience is varied and deepened by local differences, such

course of action induces men to look upon the organs of State government as hopelessly inadequate, and to center their attention and their purposes entirely in the Federal Government.<sup>1</sup> Evidently he held the view that the fault-finding of our day has had a real part in the centralizing tendencies of the times. Elihu Root had gone farther and argued on the assumption that the fault-finding had been warranted. He said to the Pennsylvania Society, in New York, December 12, 1906, that the intervention of the National Government in many of the matters which it had recently undertaken, would have been wholly unnecessary if the States themselves had been alive to their duty toward the general body of the country. "It is useless," he said, "for the advocates of State rights to inveigh against the supremacy of the constitutional laws of the United States, or against the extension of National authority in the fields of necessary control where the States themselves fail in the performance of their duty."

It may be that Mr. Root was justified in his premises and Professor Reinsch in his implication, and yet it would not be impossible to find basis for argument that in each case there may have been confusion of cause and effect. If economic and social changes well-nigh revolutionary have been at the bottom of the whole matter, perhaps the States are withering by reason of forces beyond their control and blame has been a result rather than a factor.

Scientific and mechanical progress has had important political consequence in a way not generally understood. The development of transportation and communication, the steam locomotive, the electric motor, the internal combustion engine, the automobile, the airplane, the telegraph, the telephone, the radio, have greatly broadened the scope of human relationships. The boundaries of village, town, city, or even a State, no longer confine interests. The town-meeting has dwindled in importance because the town can no longer live unto itself alone. Home rule for cities is a losing cry because millions who dwell outside the cities are almost as much concerned in their affairs as those who elect the city councils. The State Legislatures, flooded with problems that once were local and left to localities, find some relief in the transfer of old tasks to the national government. Deplore it as much as we please, resist it as stoutly as

<sup>1</sup> Paul S. Reinsch, *American Legislatures and Legislative Methods*, 127.



we can, centralization marches on. It may be delayed, but it cannot be stopped.

Yet even though centralization has gone far, the field occupied by the State Legislatures is still exceedingly important; and the very fact that legislative experiments are rendered possible by this system and that problems like those of economic control can be worked out in smaller areas before being attempted on a national scale, renders it highly desirable that the strength of local institutions shall be maintained as far as possible. Here indeed lies one of the great virtues of the Federal system. As we work out the problems side by side, we help each other. We copy each other's successes, avoid each other's blunders. By comparisons we advance.

To that end much is to be hoped from the American Legislators' Association that has been formed through the intelligent zeal of Henry W. Toll to organize the exchange of information. Also it bids fair to encourage the regional co-operations that promise to be the next important step in our political development. Groups of States that have kindred commercial, industrial, or engineering interests are likely to develop methods of joint activity that will supplement present government possibilities. They may help at least to delay centralization.

#### IN CONCLUSION

In ending the avocation of twenty years I would speak a personal word to those I have most hoped to help, the students of political science. If the four volumes of which this is the last, shall have aided them to a fuller knowledge of the history of representative government, a clearer conception of the reasons for our lawmaking institutions, a better understanding of their present working, a sounder judgment of what should be done to enlarge their usefulness, the chief purpose of my labors will have been accomplished.

If in this I shall have contributed even a little toward inspiring trained youth to gratify what Arnold called "the highest earthly desire of the ripened mind, the desire of taking an active part in the great work of government," another purpose will have been achieved. In our country the circumstances of a political career are none too alluring. Advancement is a matter of chance. Money compensation seldom corresponds to the value of service. There are no such prizes as the business world

offers, none such as are the reward of prominence in the practice of medicine or law. Scant if any provision can be made against the needs of sickness, old age, or family security. The ever-present possibility of defeat at the next election, with the likelihood of difficulty then in finding gainful occupation, is a constant menace to those without independent income, a menace the more ominous as the years pass. There must be many absences from the comforts of home, and if the highest promotion is won, that to Washington, the home itself may have to be transferred, with long periods of sojourn away from friends and familiar surroundings. In such case the upbringing of children may become a more serious problem.

On the other hand there is the opportunity to be of wider service to one's fellows than any other field of endeavor presents. Service brings the noblest satisfaction in life. Its broadest range is to be found in the making of laws. The physician relieves the sufferings of a small circle of patients. The lawyer helps out of their troubles a few hundreds of men. The clergyman reaches directly only enough of the devout to fill an audience room, and indirectly his ministrations affect but one community. The lawmaker can help toward making life happier for millions of mankind.

This, if he will, he can do without loss of self-respect. It is not true that to get the opportunity he must debase himself by resort to questionable practices. If my own experience in more than a score of campaigns for election is any criterion, it is possible to enter upon and with reasonable continuity to stay long in public life without improper or excessive use of money, and to perform the duties of representative office without sacrifice of conviction or wrench of conscience.

No more difficult task than the making of laws confronts the intellect. Such a task should appeal to men who would exert to the full the powers of mind with which they may have been endowed. As the athlete finds his greatest pleasure in the use of his body, so should the thinker find it in the use of his brain. If for no other reason this alone should inspire studious youth to prepare for opportunity to enter legislative halls.

My advice is to start at the bottom of the ladder. Acquaintance with local affairs and human nature through service in a city council will prove helpful, but if that is impracticable, certainly service in a State Legislature should precede service

in Congress. It will give training in parliamentary procedure, in committee work, in addressing assemblies, together with a knowledge of administrative processes, indeed all the processes of government, that will prove invaluable if opportunity in national office comes later.

After serving in both Legislature and Congress, my own conclusion is that the work of a Legislature brings the more of personal satisfactions. The Legislature deals with a wider range of problems that directly concern the daily lives of the people. Congress handles a few big issues, a great deal of its work is comparatively trivial. Of course, measured by money or by population affected, Congress is the far more important body, but in point of principles and policies the work of the State Legislature is the broader. So let no State legislator feel sure that he is a loser if chance keeps him long in the State House instead of sending him to Congress.

The most serious loss felt by the man who goes to the national House from the Legislature is that of the opportunity to share in the treatment of the important questions that reach the floor from other than his own committees. The House is so large and the volume of its business is so great that inevitably its members become specialists, with work confined to the problems of their respective committees. On the floor of the House itself they rarely get the chance to take influential part in discussion of the more important bills reported by committees other than their own.

Whether in Legislature or Congress, disappointments and disillusion come as in every other field of human activity, but the satisfactions outweigh. It is my hope that by the labors of these volumes I shall have in some measure repaid for such share of them as has been my lot. It is also my hope to have contributed something to just appreciation of the part played by the legislative branch in giving to our States and to the Nation wise and beneficent government.

I end my task with strengthened conviction that in its frame and in its working our government is the best that man has yet devised. It can be bettered. Its machinery should be adjusted to new conditions. Here lies the opportunity, the duty, of legislators.

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